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Recent Developments in Aviation Law

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RECENT DEVELOPMENTS IN AVIATION LAW

JONATHAN S. ZISS*
SALEEL V. SABNIS**

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I. INTRODUCTION

THIS ARTICLE SURVEYS the highlights of aviation-related liability litigation pending in United States courts in 2014. The authors' intent is to present a blend of prominent decisions which are interesting, controversial, and/or potentially trendsetting. Where appropriate, the authors have provided editorial content. However, the goal of this article is to provide an objective recital of recent aviation decisions for the benefit of the aviation practitioner.

2014 was a year in which aviation in all its applications—commercial airlines, general aviation, military operations, hobby air-

craft, even suborbital spacecraft—were prominently featured in the public consciousness. The various causes of this notoriety were, let it be said, by and large inadvertent, and were mostly tragic. Worldwide newspaper headlines beyond counting, and television hours in the thousands, documented disasters involving two Malaysia Airlines flights.¹ In Buffalo, New York, the claims of three persons (including a fatality) arising out of the February 12, 2009 crash of a commuter plane (Continental Connection Flight 3407) commenced trial in September, 2014, captivating that community for many weeks.² The New Year brought still more tragic news involving an AirAsia airliner.³ And, when airline disasters were not grabbing headlines, unmanned aircraft systems were.

Of course, there is a lag between the occurrence of accidents and incidents and the judicial decisions stemming from related litigation. Therefore, one can reasonably expect that the impact of 2014's eventful "aviation year" will be felt throughout our court system for years to come. That said, a few of these topics

¹ On March 8, 2014, Malaysia Airlines Flight 370 departed from Kuala Lumpur International Airport at 12:41 a.m. Malaysia Standard Time. The Boeing 777 was scheduled to land at Beijing Capital International Airport at 6:30 a.m. China Standard Time, on March 8. On board were 227 passengers and twelve crewmembers. Less than one hour into the flight, contact with Flight 370 was lost and was never reestablished. The aircraft was neither seen nor heard from again. A massive search of land and sea turned up neither wreckage nor any remnants. *Missing Malaysia Plane MH340: What We Know*, BBC NEWS ASIA, www.bbc.com/news/world-asia-26503141 (last updated Jan. 30, 2015). On January 29, 2015, the Malaysian government declared MH370 to be an "accident" and all on board were presumed dead. Keith Bradsher, *Loss of Malaysia Airlines Flight 370 Is Declared an Accident*, N.Y. TIMES (Jan. 29, 2015), http://www.nytimes.com/2015/01/30/world/asia/malaysia-declares-loss-of-flight-370-in-march-an-accident.html?_r=0. On July 17, 2014, MH17 (a Boeing 777) was en route at high altitude from Amsterdam to Kuala Lumpur when it crashed with 283 passengers on board in eastern Ukraine, a conflict-stricken territory. *MH17 Malaysia Plane Crash in Ukraine: What We Know*, BBC NEWS EUROPE, <http://www.bbc.com/news/world-europe-28357880> (last updated Sept. 9, 2014).

² *Trial Begins in Case of Commuter Plane That Crashed Into Home Near Buffalo*, CBS NEW YORK (Sept. 18, 2014, 3:13 PM), <http://newyork.cbslocal.com/2014/09/18/trial-begins-in-case-of-commuter-plane-that-crashed-into-home-near-buffalo/>.

³ *Flight QZ8501: What We Know About the AirAsia Plane Crash*, BBC NEWS ASIA, <http://www.bbc.com/news/world-asia-30632735> (last updated Jan. 20, 2015). "The Airbus A320-200, carrying 162 people from Surabaya in Indonesia to Singapore, was just over 40 minutes into its flight when contact was lost during bad weather. The Indonesian Transport Minister said the plane had climbed at an abnormally high speed before stalling. Wreckage and bodies were recovered floating some 16km (10 miles) from the plane's last known co-ordinates."

have already registered on the 2014 liability litigation landscape and are discussed herein.

Setting “breaking news” to one side, 2014 saw a fair number of cases in which courts continued to wrestle with the scope and application of federal preemption of state law, including express preemption, implied preemption, ordinary preemption, and standard of care preemption.⁴ This is nothing new. As the cases discussed herein demonstrate, there is something less than uniformity in the way that the federal courts approach the challenging issue of preemption.

Among the other relatively common issues that continued to blossom throughout 2014 are the Montreal Convention,⁵ the Warsaw Convention,⁶ and the Federal Tort Claims Act,⁷ along with forum non conveniens,⁸ personal jurisdiction,⁹ and conflict of laws.¹⁰ 2014 most likely saw the last of the issues arising out of Flight 3407 to be adjudicated, but the litigation arising out of the crash of Asiana Flight 214 in San Francisco in July, 2013, is most likely just beginning to impact the legal landscape.¹¹

This article is not intended to be an all-encompassing capture of every category of aviation cases; rather, it is a curated collection of 2014 decisions which the authors hope will guide the reader in the year ahead.

II. DISCUSSION OF CASES

A. FEDERAL PREEMPTION

1. *Ventress v. Japan Airlines*

In *Ventress v. Japan Airlines*, the issue was whether the Federal Aviation Act (the Act) preempts a statutory and common-law retaliation (whistleblower) and constructive termination claim.¹² Since there is no express preemption of such a claim found in the Act, one must find implied preemption, if any.¹³ Martin Ventress, a flight engineer, alleged that Japan Airlines (JAL) “sub-

⁴ See *infra* text accompanying notes 12–109.

⁵ See *infra* text accompanying notes 110–96.

⁶ See *infra* text accompanying notes 197–207.

⁷ See *infra* text accompanying notes 271–300.

⁸ See *infra* text accompanying notes 208–18.

⁹ See *infra* text accompanying notes 343–440.

¹⁰ See *infra* text accompanying notes 327–42.

¹¹ See *infra* text accompanying notes 229–49.

¹² *Ventress v. Japan Airlines*, 747 F.3d 716 (9th Cir. 2014).

¹³ See *id.*

jected him to unnecessary psychiatric evaluations and prevented him from working because he raised . . . safety concerns and submitted two safety reports to several federal agencies” regarding a fellow pilot’s medical fitness.¹⁴

The procedural history of the case spans more than ten years, but for purposes of this report, it suffices to note that the district court granted judgment on the pleadings to JAL.¹⁵ On appeal, the Ninth Circuit affirmed based on its conclusion that the Act impliedly preempts Ventress’s retaliation and constructive termination claims—but not necessarily all such claims brought under California law.¹⁶

The court first surveyed cases in which the preemptive scope of the Act had been examined. It compared “claims based on the airline crew’s failure to warn passengers about blood clots”¹⁷ (which are found to be preempted due to pervasive regulations) with a routine tort claim involving aircraft stairs¹⁸ (which is not preempted by federal law). Looking at the determination of JAL concerning the fitness of Ventress to fly (indeed, the gravamen of the claim), the appellate court noted, “[o]ur review of the applicable [Federal Aviation Regulations (FAR or FARS)] confirms that pilot qualifications and medical standards for airmen, unlike aircraft stairs, are pervasively regulated.”¹⁹ “[B]y inviting the factfinder to pass on questions of pilot qualification and medical fitness, Ventress’s state law claims impinge on Congress’s goal of ensuring ‘a single, uniform system for regulating aviation safety.’”²⁰ The court added,

In reaching this conclusion, we need not, and do not, suggest that the [Act] preempts all retaliation and constructive termination claims brought under California law. Indeed, we recognize that Congress has not occupied the field of employment law in the aviation context and that the [Act] does not confer upon the agency the exclusive power to regulate all employment matters involving airmen. Instead, we hold that federal law preempts state law claims that encroach upon, supplement, or alter the federally occupied field of aviation safety and present an obstacle

¹⁴ *Id.* at 719–20.

¹⁵ *Id.* at 720.

¹⁶ *Id.* at 721–24.

¹⁷ *Id.* at 721 (discussing *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007)).

¹⁸ *Id.* (discussing *Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009)).

¹⁹ *Id.* at 721.

²⁰ *Id.* at 722 (quoting *Montalvo*, 508 F.3d at 471).

to the accomplishment of Congress's legislative goal to create a single, uniform system of regulating that field.²¹

2. Sikkelee v. Precision Airmotive Corp.

For the second year running, *Sikkelee v. Precision Airmotive Corp.*²² appears in "Recent Developments in Aviation Law."²³ Filed in 2007, by 2014 this product liability action arising out of the crash of a Cessna 172N had been whittled down to the plaintiff's²⁴ claims of negligence and strict liability asserted against a single defendant, AVCO Corporation's Lycoming Engine Division (Lycoming), as they relate to an engine overhaul in 2004.²⁵ With trial approaching in late 2013, the district court "found itself 'without sufficient guidance from either precedent or the parties as to the law that will govern not only the jury's deliberations, but also the Court's ruling on the relevance of evidence, motions . . . and other questions.'"²⁶ What admittedly "vexed" the district court was the treatment of Pennsylvania law in the Third Circuit, its district courts, and Pennsylvania's state courts, pertaining to strict product liability,²⁷ and also federal

²¹ *Id.* at 722–23.

²² *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431 (M.D. Pa. 2014).

²³ Jared L. Watkins & Evan Katin-Borland, *Recent Developments in Aviation Law*, 79 J. AIR LAW & COMM. 215, 243–47.

²⁴ The "plaintiff is Jill Sikkelee, individually and as personal representative of the estate of David Sikkelee," to whom the plaintiff was married when he died in the subject crash in 2005. *Sikkelee*, 45 F. Supp. 3d at 434.

²⁵ The particularly convoluted procedural history of this case is mapped with clarity in the "Background" segment of the district court's lengthy opinion. *Id.* at 434–38. The instant decision can appropriately be referred to as *Sikkelee III*.

²⁶ *Id.* at 438.

²⁷ At the time, *Sikkelee III* was under consideration, there was considerable uncertainty as to whether the Pennsylvania Supreme Court would adopt the Restatement (Third) of Torts or would continue in its application of the Restatement (Second) of Torts. The confusion has since been cleared up to a considerable extent, as the Pennsylvania High Court published its decision on November 19, 2014, in the matter *Tinchner v. Omega Flex, Inc.*, 104 A.3d 328, 343 (Pa. 2014). In *Tinchner*, allocator was granted on the question of whether the Court "should replace the strict liability analysis of § 402A of the Second Restatement with the analysis of the Third Restatement . . . [and] whether, if the Court were to adopt the Third Restatement, that holding should be applied prospectively or retroactively." *Id.* at 344. The Court ultimately held, *inter alia*, "[t]o the extent relevant here, we decline to adopt the Restatement (Third) of Torts: Product Liability §§ 1 *et seq.*, albeit appreciation of certain principles contained in that Restatement has certainly informed our consideration of the proper approach to strict liability in Pennsylvania" *Id.* at 335.

(regulatory) law pertaining to the negligence standard of care.²⁸

While the district court's lengthy decision covers a variety of interesting issues including law of the case and judicial estoppel, to name but two, readers of this article will likely find the discussion of implied field preemption to be especially germane.

The starting point for this analysis is the *Abdullah* decision. *Abdullah* established implied federal field preemption with regard to aviation safety as the law in the Third Circuit.²⁹ However, *Abdullah* dealt with "aircraft operations"³⁰ (the claim involved an episode of in-flight turbulence), whereas *Sikkelee* does not; it is a product design case.³¹ On this point, the court noted that the general standard of care found in 14 C.F.R. § 91.13 is not applicable to an engine designer such as Lycoming.³² But this conclusion merely called the question as to what federal standard of care applies to the design and manufacture of aircraft. With § 91.13's general "careless or reckless" standard inapplicable, with the creation of a federal common law "not viewed as an option," and with the use of state common law as a gap filler deemed "anathema to the very notion that the field is preempted," the court was left to ponder.³³ Specific federal aviation regulations would apply where they exist—that much makes abundant sense. But as to matters for which there are no specific FARS, where there is a "gap" in the regulatory scheme—what to do then? It is on this latter point that the legacy of *Sikkelee III* may ultimately rest.

The court noted that *Sikkelee* is incorrect when she suggests that "there can be no pervasive regulation of the field of aviation safety, thus preempting the field from state regulation, if there

²⁸ The source of confusion—or vexation, to more closely track the language of District Judge Brann—was the application of the venerable decision of the Third Circuit in *Abdullah v. Am. Airlines*, 181 F.3d 363 (3d Cir. 1999), in which the appellate court held "that federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation." *Abdullah*, 181 F.3d at 367.

²⁹ *Sikkelee*, 45 F. Supp. 3d at 446–47.

³⁰ *Abdullah*, 181 F.3d 363.

³¹ *Sikkelee*, 45 F. Supp. 3d at 434.

³² The court in *Sikkelee III* rejected the arguments made by plaintiff "that *Abdullah* implies the general principle that aircraft engine designers should not act carelessly or recklessly, even where no specific federal regulation governs their conduct, and that if the Court finds that 'no general or specific regulation' reaches Lycoming's allegedly tortious conduct, then 'Lycoming is not immune . . . there would simply be no preemption.'" *Sikkelee*, 45 F. Supp. 3d at 446.

³³ *Id.* at 450.

are no regulations applicable to Lycoming's aircraft engine design."³⁴ More pointedly, "[t]he Court will measure Lycoming's allegedly tortious conduct against the specific federal regulations that Sikkelee asserts are applicable; if there is no genuine issue as to whether Lycoming violated the specific regulations, then summary judgment in Lycoming's favor is warranted."³⁵ And, if there is no specific federal regulation applicable? "[W]here Congress determines that common law tort claims should play no role in a regulatory scheme, preemption may leave an injured person remediless."³⁶

The court having determined that specific regulations will fix the standard of care, the plaintiff asserted that Lycoming violated certain Civil Aviation Regulations (predecessors to the Federal Aviation Regulations) with regard to the design and construction of the reciprocating engine.³⁷ However, the court in *Sikkelee III* observed, "[i]n tension with Sikkelee's assertion that Lycoming has violated these provisions, the [Federal Aviation Administration (FAA)]'s issuance of a type certificate for the [subject engine] in 1966 denotes the Administrator's finding that the engine met all applicable requirements."³⁸ "Accordingly, [the] Court holds that the Administrator's issuance of a type certificate . . . is conclusive of the engine's compliance with the design and construction regulations. Lycoming's motion for summary judgment on Sikkelee's claims predicated on the violation of these regulations should be granted."³⁹ (Plaintiff's claims on the theory that Lycoming violated its duty to report engine defects to the FAA survived dismissal.)⁴⁰

3. *Psalmomd v. Delta Air Lines, Inc.*

Psalmomd v. Delta Air Lines, Inc. arose out of an emergency evacuation from a Delta Air Lines (Delta) flight from Atlanta to Los Angeles in 2011.⁴¹ After passengers heard a loud noise and noticed flames coming out of the left engine, the pilot returned

³⁴ *Id.* at 443–44 (internal brackets omitted).

³⁵ *Id.* at 451.

³⁶ *Id.* at 450 (referencing *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012)).

³⁷ *Id.* at 443.

³⁸ *Id.* at 452.

³⁹ *Id.* at 456.

⁴⁰ *Id.* at 456–60.

⁴¹ *Psalmomd v. Delta Air Lines, Inc.*, No. 13-2327, 2014 WL 1232149, at *1 (N.D. Ga. Mar. 25, 2014).

to the Atlanta airport, where the plane landed without incident.⁴² Evacuation slides were deployed and the passengers were instructed to exit via the slides.⁴³ Plaintiff Psalmond alleged that he was injured when he was struck in the back and shoulder by another passenger who came down the slide prematurely.⁴⁴ He and his wife sued the airline asserting state law claims of negligence and gross negligence.⁴⁵ Delta removed the action to the U.S. District Court based on federal question jurisdiction under 28 U.S.C. § 1331.⁴⁶

The district court first considered the so-called well-pleaded complaint rule, noting that “[a]s a general rule, a case arises under federal law when it appears from the well-pleaded complaint that federal law creates the cause of action or that resolution of the dispute requires interpretation of a substantial federal issue.”⁴⁷ Or, a state claim may be deemed to arise where “complete preemption” is found such that federal regulation “so occupies a given field” that any claims arising in that field “must . . . be characterized as federal in nature.”⁴⁸ The court went on to preliminarily note that the “plaintiffs do not assert any federal claims in the complaint . . . [n]or do the asserted claims raise any substantial federal issues,” presaging, as it were, the court’s ultimate view of the merit of federal question removal.⁴⁹

The airline took the position that the state negligence claims asserted in the complaint are completely preempted by the Act as amended by the Airline Deregulation Act (ADA).⁵⁰ It argued that the state negligence claims are subject to implied preemption, which extends to the entire field of aviation safety.⁵¹ As an alternative to implied field preemption, the airline argued that “emergency disembarkation procedures are related to an airline’s core ‘service’ of providing safe transportation, and that the asserted claims are thus *expressly* preempted by the ADA.”⁵²

⁴² *Id.* at *1.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at *2 (internal citation omitted).

⁴⁸ *Id.* (quoting *Dunlap v. G & L Holding Grp., Inc.*, 381 F.3d 1285, 1290 (11th Cir. 2004)) (internal citations omitted).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at *3.

⁵² *Id.* (emphasis added).

The district court first concluded that implied preemption exists, but does not extend to matters unrelated to airline rates, routes or services.⁵³ With regard to express preemption, the district court made two points. First, the court looked to the decisions of the Eleventh Circuit in *Branche v. Airtran Airways, Inc.*⁵⁴ and the Fifth Circuit in *Hodges v. Delta Airlines, Inc.*⁵⁵ Those cases “interpret[] the ADA’s ‘services’ term to include all of the ‘[contractual] features of air transportation’ that are bargained for by air carriers and their passengers and that Congress intended to deregulate via the ADA, such as ‘ticketing, boarding procedures, provision of food and drink, and baggage.’”⁵⁶ Quoting a decidedly arch passage in *Branche*, the district court explained, “airlines do not compete on the basis of likelihood of personal injury . . . and as such it does not undermine the pro-competitive purpose of the ADA . . . to permit states to regulate this aspect of air carrier operations.”⁵⁷

Having concluded that neither implied field preemption nor express preemption applies, the court in *Psalmoud* noted “that defendant has failed to acknowledge the distinction that the Eleventh Circuit draws between the ‘ordinary preemption’ that may provide an affirmative defense to a state law claim and the ‘complete preemption’ that allows for removal of a state claim to federal court.”⁵⁸ “Ordinary defensive preemption does not furnish federal subject-matter jurisdiction under 28 U.S.C. § 1331. . . . Complete preemption entirely transforms a state-law claim into a federal claim, regardless of how the plaintiff framed the legal issue in his complaint and thus does supply federal jurisdiction.”⁵⁹ The court added that such complete preemption is “rare,” and that in any event, it has not been shown in this instance.⁶⁰

The court buttressed its decision by way of 49 U.S.C. § 41112(a), “which requires an air carrier to maintain an insurance policy or self-insurance plan that is ‘sufficient to pay . . . for bodily injury to, or death of, an individual or for loss of, or dam-

⁵³ *Id.*

⁵⁴ 342 F.3d 1248 (11th Cir. 2003).

⁵⁵ 44 F.3d 334 (5th Cir. 1995).

⁵⁶ *Psalmoud*, 2014 WL 1232149, at *4 (internal quotation marks omitted).

⁵⁷ *Id.*

⁵⁸ *Id.* at *5 (citing *Cnty. State Bank v. Strong*, 651 F.3d 1241, 1261 (11th Cir. 2011)).

⁵⁹ *Id.* (internal quotation marks and citations omitted).

⁶⁰ *Id.*

age to, property of others, resulting from the operation or maintenance of the aircraft.’”⁶¹ The court noted that “[t]he Eleventh Circuit has cited this provision as evidence that Congress did not intend for the ADA to preempt state personal injury claims.”⁶²

Despite its chilly reception to the defendant’s preemption argument,⁶³ the court held that “its asserted basis for removal was not ‘objectively unreasonable.’”⁶⁴ Accordingly, the court found that an award of fees and costs was not warranted under 28 U.S.C. § 1447(c).⁶⁵

4. Silverwing at Sandpoint, LLC v. Bonner County

The subject matter of the *Silverwing* dispute concerned property in proximity to the Sandpoint Airport in Sandpoint, Idaho.⁶⁶ In April 2006, the plaintiff purchased 18.1 acres of land on the west side of the airport upon which it intended to design and construct a 45 unit planned unit development of hangars for airplanes with optional second-floor residences.⁶⁷ The plaintiff claimed that, included with the purchase of land, was a perpetual taxiway easement allowing it and the residents of the proposed development to access the airport runway from its property.⁶⁸

On April 1, 2007, the plaintiff and Bonner County (the County) entered into an agreement granting the plaintiff a perpetual right of access to the airport in private aircraft from the planned unit development property for a yearly access fee.⁶⁹ The FAA indicated to the County that it had no objection to the proposed right-of-access agreement so long as the agreement was approved by the FAA.⁷⁰ The plaintiff invested significant sums on the development and on construction of the west taxiway, as well as marketing the development.⁷¹

⁶¹ *Id.* at *4.

⁶² *Id.* (citing *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258 (11th Cir. 2003)).

⁶³ The court directed that the action be remanded to the state court in which it originally had been filed. *Id.* at *6.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Silverwing at Sandpoint, LLC v. Bonner County*, No. 2:12-00287, 2014 WL 6629600, at *1 (D. Id. Nov. 21, 2014).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at *2.

However, problems arose. In December 2008, the FAA placed the airport project in “noncompliance” status for three years; the County subsequently implemented a “corrective action plan” to bring the airport back into compliance.⁷² Even when the FAA expressed increasing concerns regarding certain proposed changes to the project design, the plaintiff claimed that the County still represented that it would not have to relocate the west taxiway.⁷³

Yet, in 2011, the plaintiff alleges that the County, contrary to prior representations, notified the plaintiff that it would be required to remove the west taxiway and relocate it 60 feet to the west in order to comply with FAA standards.⁷⁴ In December 2011, the County submitted an amended action plan to the FAA depicting the relocation of the airport and the plaintiff’s taxiway to the west.⁷⁵ The FAA and the County approved the corrective action plan in October 2011.⁷⁶ In February 2012, the FAA tentatively placed the airport back into compliance while extinguishing the plaintiff’s perpetual easement rights.⁷⁷

The plaintiff filed a lawsuit against the County alleging, among other causes of action, the breach of the covenant of good faith and fair dealing and promissory estoppel.⁷⁸ The County filed a motion for summary judgment arguing that the state law claims should be dismissed as a matter of law because aviation safety and airport design standards are entirely preempted by federal law.⁷⁹ The County argued that its actions regarding the location of the runway were taken in compliance with mandated federal statutes and FAA regulations concerning airport safety.⁸⁰ In response, the plaintiff asserted that federal preemption did not extend to local decisions about siting or expanding airports.⁸¹

The court found that the plaintiff’s claim for the breach of the covenant of good faith and fair dealing was preempted by federal law but the promissory estoppel claim was not.⁸² As to

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at *3.

⁷⁹ *Id.* at *6.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at *10.

the latter, the court noted that the estoppel claim was based on allegations that did not involve sufficient interference with federal laws and regulations; rather, it addressed supposed misrepresentations made by the County.⁸³ That is, the promissory estoppel claim centered around specific allegations involving the County's alleged assertions to the plaintiff upon which the plaintiff relied on when deciding to expend further money on the project.⁸⁴ As to the breach of the covenant of good faith and fair dealing, the court found this claim was properly preempted because it raised allegations that were based on the FAA's determination that the airport was not in compliance with regulations as well as to the County's efforts to bring the airport back in compliance with said regulations.⁸⁵ The motion for summary judgment was therefore granted as to the breach of the implied covenant of good faith and fair dealing.⁸⁶

5. Naples v. Delta Air Lines, Inc.

In *Naples v. Delta Air Lines, Inc.*, the plaintiff filed a lawsuit alleging that Delta negligently failed in its duty to protect her from any hidden or latent hazards on its airplane.⁸⁷ Plaintiff evidently tripped and fell on a luggage strap of another passenger's bag during the boarding process on a Delta flight preparing to depart to Flint, Michigan.⁸⁸ Delta argued that the plaintiff had "failed to set forth a federal standard of care and that the Federal Aviation Act and its corresponding regulations preempted the field."⁸⁹ Delta also argued "that even if the plaintiff had articulated a federal standard of care, it did not breach any regulations."⁹⁰ Alternatively, it argued that even if a state standard of care applied, Delta had not breached that standard; there was insufficient evidence for the plaintiff's claim to proceed where Delta did not cause the tripping hazard or have reason to know of the protruding strap.⁹¹

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Naples v. Delta Air Lines, Inc.*, No. 13-11257, 2013 WL 6919717, at *1 (E.D. Mich. Jan. 16, 2014).

⁸⁸ *Id.* at *2.

⁸⁹ *Id.* at *4.

⁹⁰ *Id.*

⁹¹ *Id.*

The court granted summary judgment for Delta.⁹² The court sided with prior case law that held that ordinary field preemption applies to airline safety operations even while an airplane is not in-flight such that any federal standard of care should preempt any applicable state standards.⁹³ As the court found that ordinary preemption still allowed for state remedies, it continued its analysis using a federal standard of care and Michigan's standard of care.⁹⁴ As it related to the federal standard, it noted that the plaintiff's injury occurred before the flight attendants' duty (as defined in the regulations) to check the status of stowed baggage arose.⁹⁵ The court rejected the plaintiff's attempt to impose an additional duty on Delta that would have required it to have assured that the luggage was properly stowed before the timeframe proscribed by the federal regulations.⁹⁶ In regards to Michigan law, the court found that the strap which caused the fall was "open and obvious" and thus plaintiff's claim was barred as a matter of law.⁹⁷ Under Michigan's common law addressing a common carrier's duty to protect passengers from conditions under the carrier's "control," the court found that the presence of a thick strap in the aisle of an airplane while passengers were finding their seats was neither a danger caused by Delta nor a danger under Delta's control.⁹⁸

6. Wells v. Kentucky Airmotive, Inc.

Plaintiffs filed a lawsuit asserting nuisance and trespass claims against a local airport board and various other businesses operating at the airport.⁹⁹ The plaintiffs alleged that they suffered damages as a result of aircraft operating at altitudes below 500 feet above their property, which was located 1,000 feet from the end of one runway.¹⁰⁰ Plaintiffs sought permanent injunctive relief prohibiting the use of the first 500 feet of airspace above their property based on their assertion of "exclusive control over and the right to possess the property, upon which their home sits, as well as the immediate reaches of the atmosphere envelop-

⁹² *Id.* at *9.

⁹³ *Id.* at *5.

⁹⁴ *Id.* at *6.

⁹⁵ *Id.* at *6-7.

⁹⁶ *Id.* at *7.

⁹⁷ *Id.*

⁹⁸ *Id.* at *8.

⁹⁹ *Wells v. Kentucky Airmotive, Inc.*, No. 2012-001894, 2014 WL 4049894, at *1 (Ky. Ct. App. Aug. 15, 2014).

¹⁰⁰ *Id.* at *1.

ing their home.”¹⁰¹ The trial court dismissed the plaintiffs’ claims and the plaintiffs filed an appeal.¹⁰²

On appeal, the plaintiffs argued, in part, that their claims were not preempted by federal aviation law and the relief they sought did not conflict with applicable aviation regulations.¹⁰³ In contrast, the airport defendants contended that the plaintiffs’ complaint alleged causes of action based solely on the effects of aircraft operation, a field clearly preempted by federal law.¹⁰⁴ The defendants argued that “since the field is preempted, a state court could not enter an order attempting to regulate aircraft operations.”¹⁰⁵

The Kentucky Court of Appeals sided with the airport defendants.¹⁰⁶ The court acknowledged that “[t]he scheme of federal regulation in these areas is sufficiently comprehensive to make it reasonable to infer Congress has left no room for supplementary state regulation.”¹⁰⁷ The court noted that if a trial court were to grant plaintiffs any relief relating to the safe and proper operation of an aircraft over their property, “that court would be invading an area of law pervasively controlled and extensively regulated by the federal government.”¹⁰⁸ The court affirmed the dismissal and concluded that the plaintiffs’ claims were “wholly preempted, as a ruling in their favor would create ‘an obstacle to accomplishing federal objectives’ relating to the safe operation of aircraft.”¹⁰⁹

B. THE MONTREAL CONVENTION

The Montreal Convention, formally titled the Convention for the Unification of Certain Rules of International Carriage by Air,¹¹⁰ was adopted in 1999 and intended to supplant certain provisions of its predecessor, the Warsaw Convention. The Montreal Convention attempts to establish uniformity of rules relating to the international carriage of passengers, baggage and

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at *4.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at *5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106–45 1999 WL 33292734 (2000) [hereinafter Montreal Convention].

cargo. This year saw its share of interesting cases involving the Montreal Convention, especially as it relates to what constitutes a timely claim and the treaty's preemptive reach.

1. *Narayanan v. British Airways*

The U.S. Court of Appeals for the Ninth Circuit in *Narayanan v. British Airways* analyzed the plain language of Article 35(1) of the Montreal Convention and held that a claim for damages for death or bodily injury is untimely if it is not brought within two years of the date of the aircraft's arrival at a destination regardless of if the claim actually accrues *after* that time period.¹¹¹

On December 26, 2008, Papanasam Narayanan boarded a British Airways flight from Los Angeles, California to London, England.¹¹² At the time, Narayanan suffered from terminal lung disease that required supplemental oxygen during the flight.¹¹³ However, British Airways allegedly denied Narayanan access to his oxygen during the flight.¹¹⁴ On landing, he received medical treatment, eventually returned to the United States in January 2009, and died on June 11, 2009.¹¹⁵

On March 7, 2011, Narayanan's widow and two adult children filed a claim against British Airways alleging that the denial of supplemental oxygen on the flight to London contributed to Narayanan's death.¹¹⁶ "British Airways removed the case to federal court and moved to dismiss under Federal Rule of Civil Procedure 12(b)(6)."¹¹⁷ British Airways argued that the complaint was time-barred under the Montreal Convention's two-year statute of limitations period detailed in Article 35(1) because the London flight arrived or should have arrived on December 26, 2008, and the family did not file their complaint until March 7, 2011, three months after the limitations period ended.¹¹⁸ The district court dismissed the complaint as untimely.¹¹⁹ The family appealed, arguing that the limitations period should have been

¹¹¹ *Narayanan v. British Airways*, 747 F.3d 1125, 1126 (9th Cir. 2014).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1129.

triggered on the day of Narayanan's death, when their wrongful death claim began accruing pursuant to California law.¹²⁰

The Ninth Circuit affirmed the district court's decision while scrutinizing the scope of Article 35(1) vis-à-vis California law.¹²¹ Looking at the plain language of the statute, the court held that the plaintiffs' complaint was clearly untimely.¹²² Under Articles 29 and 35(1) of the Convention, a claim for damages must be filed within two years of the date the aircraft arrived or ought to have arrived at its destination.¹²³ Therefore, even though Narayanan's death occurred six months after the flight, the statute of limitations period for the wrongful death claim under the Montreal Convention was triggered when the flight arrived in London in December 2008.¹²⁴ The court noted that both the Montreal Convention and its predecessor, the Warsaw Convention, intended to extinguish a cause of action after fixed time periods and there was no ambiguity within the terms of the Montreal Convention that would have tolled the statute of limitations until the date of Mr. Narayanan's death.¹²⁵

2. DeJoseph v. Continental Airlines, Inc.

Plaintiff brought a negligence claim for injuries suffered while on a Continental Airlines flight stemming from the spillage of a hot beverage.¹²⁶ The plaintiff brought suit in New Jersey state court but Continental removed the case on federal jurisdiction grounds by arguing that the negligence claims were subject to the Montreal Convention, which provided the exclusive cause of action and remedy for the claims.¹²⁷ Continental argued that the exercise of federal jurisdiction was proper based on the doctrine of complete preemption that was, it argued, deemed to apply when the preemptive force of a federal statute entirely displaces any state cause of action.¹²⁸

The court analyzed the distinction between complete preemption and conflict preemption in the context of the Conven-

¹²⁰ *Id.* at 1128–29.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1129–30.

¹²⁴ *Id.* at 1130.

¹²⁵ *Id.* at 1131.

¹²⁶ *DeJoseph v. Continental Airlines, Inc.*, 18 F. Supp. 3d 595, 598 (D.N.J. 2014).

¹²⁷ *Id.* at 597, 606.

¹²⁸ *Id.* at 600 (quoting *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 354 (3d Cir. 1995)).

tion.¹²⁹ It detailed that there was a circuit split among federal courts regarding the preemptive impact of the Convention and cited one prominent U.S. Supreme Court decision which arguably allowed, depending on the interpretation of the holding, the Convention to either completely preempt state law claims or preempt them subject to conflict preemption.¹³⁰ That said, the court noted that the Supreme Court had not expressed any unequivocal intention for the application of complete preemption.¹³¹ Furthermore, the court examined Article 29 of the Convention, which details the conditions and limits of liability under which a claim falling within the Convention may be brought, and noted that this provision appeared to expressly contemplate claims being “brought under this Convention or in contract or in tort or otherwise.”¹³² Influenced by this language and the lack of a definitive ruling in favor of complete preemption, the court refused to exercise federal question jurisdiction on the grounds of complete preemption and remanded the case to state court.¹³³

3. Benjamin v. American Airlines, Inc.

Benjamin v. American Airlines, Inc. involved a family’s travel from Florida to Haiti, gone amiss.¹³⁴ The mother and father flew from Miami to Port-au-Prince, while the daughter was ticketed for a trip from Jacksonville, Florida through Miami, and then on to Port-au-Prince on the same flight as her parents.¹³⁵ However, upon her arrival in Miami, the daughter was informed that the airline “had sold the seat to another person.”¹³⁶ The situation allegedly deteriorated from there, as the family claimed to have had a “humiliating” encounter with a rude ticket agent, who insulted them.¹³⁷ The family purchased a new ticket for the daughter to fly from Miami to Haiti, at considerable expense.¹³⁸ The new ticket proved to be a standby, and the daughter remained

¹²⁹ *Id.* at 602.

¹³⁰ *Id.* at 602–03.

¹³¹ *Id.* at 604.

¹³² *Id.* at 603.

¹³³ *Id.* at 604.

¹³⁴ *Benjamin v. American Airlines, Inc.*, 32 F. Supp. 3d 1309 (S.D. Ga. 2014).

¹³⁵ *Id.* at 1313.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

in Miami for nearly two days before being seated on a flight to Port-au-Prince.¹³⁹

Her parents, meanwhile, allegedly had no word of or from their daughter, whom they deemed “missing” and reported as such to the authorities in both countries, before being reunited by happenstance at the airport in Port-au-Prince.¹⁴⁰ Making matters still worse, the family was on a mission of mercy to deliver medication, which was partly thwarted.¹⁴¹ No refund was received for the unused leg from Miami to Haiti.¹⁴² And, both the mother and daughter suffered physical ills due to the airline’s “outrageous conduct” and its imposition of “needless stress.”¹⁴³

The plaintiffs filed suit in federal court asserting six claims for relief: breach of contract; public accommodation discrimination in violation of Title II of the Civil Rights Act of 1964; violation of 42 U.S.C. § 1981 and the Civil Rights Act of 1866; violation of 42 U.S.C. § 1985 and the Civil Rights Act of 1871; intentional infliction of emotional distress; and attorneys’ fees pursuant to 42 U.S.C. § 1988.¹⁴⁴

Defendant airline moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.¹⁴⁵ The defendant “argued that the Montreal Convention¹⁴⁶ preempts the plaintiffs’ breach of contract claim.”¹⁴⁷ The court noted, in a case-rich discussion, the majority and minority positions surrounding preemption of local law where a claim falls outside the scope of a liability treaty such as the Montreal Convention.¹⁴⁸ That is to say, should such a treaty be given complete preemptive force, or should “the preemptive effect on local law . . . extend[] no further than the [treaty’s] own substantive scope”?¹⁴⁹

The court resolved the matter in line with the “majority approach,” holding that, since the Montreal Convention does not include breach of contract for nonperformance within its sub-

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1313–14.

¹⁴¹ *Id.* at 1314.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Montreal Convention, *supra* note 110.

¹⁴⁷ *Benjamin*, 32 F. Supp. 3d at 1314.

¹⁴⁸ *Id.* at 1316.

¹⁴⁹ *Id.* (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 158 (1999)).

stantive scope, it does not preempt the claim arising out of the failure of the airline to transport the daughter on her originally ticketed flight out of Miami.¹⁵⁰ (The court noted that the Montreal Convention would preempt *delayed* performance of a contract, but not *nonperformance*.)¹⁵¹ The motion to dismiss the first claim in the complaint, for breach of contract, was denied.¹⁵²

Likewise, the civil rights claims survived the defendant's motion to dismiss, as the allegations are "largely based on the same facts underlying the breach-of-contract claim, albeit supplemented by allegations of discrimination based on race and nationality."¹⁵³ The allegations did not fall within the scope of the Montreal Convention.¹⁵⁴

The intentional infliction of emotional distress claim, however, was found to fall partly inside and partly outside the Montreal Convention.¹⁵⁵ The allegations involving roughshod customer service by the ticket agent and the purchase of a second ticket for a trip already ticketed:

are related to the *nonperformance* of the original contract rather than the delay in transporting the daughter under the second contract. In contrast, the . . . allegations [concerning the forced two-day layover in Miami] have an intimate connection with the *delayed transportation* of the daughter and therefore fall under Article 19[] [of the Montreal Convention's] purview.¹⁵⁶

The defendant proffered as a second source of preemption the ADA.¹⁵⁷ Thus, the court considered whether the stated cause of action (stemming from the rude conduct of the ticket agent) is related to rates, routes, or services of an air carrier.¹⁵⁸ Looking to the 1988 decision of the Fourth Circuit Court of Appeals in *Smith v. Comair, Inc.*, the court noted, "Suits stemming from outrageous conduct on the part of an airline toward a passenger will not be preempted under the ADA if the conduct too tenuously relates or is unnecessary to an airline's services."¹⁵⁹ The court allowed for the possibility that the ticket agent's allegedly

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1317.

¹⁵² *Id.* at 1318.

¹⁵³ *Id.* at 1319.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1320.

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ *Id.* at 1321.

¹⁵⁸ *Id.*; see 49 U.S.C. § 41713(b)(1).

¹⁵⁹ *Id.* at 1321 (quoting *Smith v. Comair Inc.*, 134 F.3d 254, 259 (4th Cir. 1988)).

rude behavior was “maliciously motivated and unnecessary to the airline’s services.”¹⁶⁰ Thus, ADA preemption was found not to apply; yet, the court went on to find that the Plaintiffs’ allegations fell short under applicable state law governing emotional distress claims.¹⁶¹

4. *Safa v. Deutsche Lufthansa Aktiengesellschaft, Inc.*

In 2014, federal courts revisited the definition of “accident” in the context of the Montreal Convention and particularly as it relates to passenger medical emergencies.¹⁶² On November 12, 2011, the plaintiff in *Safa v. Deutsche Lufthansa Aktiengesellschaft, Inc.* was scheduled to fly on a Lufthansa flight from Philadelphia to Beirut, Lebanon with a layover in Frankfurt.¹⁶³ The plaintiff boarded the flight in Philadelphia without issue.¹⁶⁴ Approximately three hours before landing in Frankford, the plaintiff fell to the ground complaining of chest pain.¹⁶⁵

The flight crew and on-board physicians treated the plaintiff during the time between his initial complaints and the aircraft’s arrival in Frankfurt.¹⁶⁶ Relying on information provided by the flight crew, the captain chose not to divert the aircraft for an intermediate landing.¹⁶⁷ When the aircraft landed in Frankfurt, the plaintiff was placed in an ambulance to be transported to the hospital.¹⁶⁸ While in the ambulance, the plaintiff suffered a prolonged cardiac arrest requiring six shocks.¹⁶⁹ He later had surgery to have a stent replaced and was placed on a ventilator for a prolonged period of time.¹⁷⁰

The plaintiff commenced a lawsuit in the U.S. District Court for the Southern District of Florida, and the case was transferred to the U.S. District Court for the Eastern District of New York.¹⁷¹ The plaintiff sought damages under Article 17 of the Montreal

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1322–23.

¹⁶² *Safa v. Deutsche Lufthansa Aktiengesellschaft, Inc.*, No. 12-2950, 2014 U.S. Dist. LEXIS 120690 (E.D.N.Y. Aug. 28, 2014).

¹⁶³ *Id.* at *6.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *7–8.

¹⁶⁷ *Id.* at *10.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

Convention.¹⁷² After the close of discovery, the defendant moved for summary judgment seeking to dismiss the complaint in its entirety.¹⁷³ The defendant contended that the plaintiff's medical episode onboard the flight did not constitute an "accident" under the Montreal Convention and that defendant did not act negligently.¹⁷⁴

The court acknowledged that there was law which supported the argument that complications arising from a passenger's medical condition are not "external" to the passenger and thus are not considered "accidents" under the Montreal Convention.¹⁷⁵ On the other hand, it also acknowledged that a flight crew's unexpected and unusual response to a passenger's medical condition had been deemed in prior cases to be "external" and thus could constitute an "accident" under the Convention.¹⁷⁶

The court determined that the plaintiff had not pointed to any crew member conduct which departed from Lufthansa's internal operating procedure regarding medical emergencies that could be deemed "unexpected" or "unusual;" therefore, the plaintiff's incident was not an accident under the Montreal Convention.¹⁷⁷ By contrast, the record made clear that the crew of the Lufthansa flight followed all of its own applicable policy and procedures with respect to medical emergencies when plaintiff demonstrated a health scare.¹⁷⁸ The court also noted that the plaintiff's heart attack did not necessarily mandate an intermediate landing.¹⁷⁹ The undisputed facts supported that the flight crew complied with every relevant airline policy and procedure including confirming with on-board physicians that the plaintiff's health issue was not life threatening.¹⁸⁰ As a result, the court granted the defendant's motion for summary judgment.¹⁸¹

¹⁷² *Id.*

¹⁷³ *Id.* at *10-11.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *14-15.

¹⁷⁶ *Id.* at *15.

¹⁷⁷ *Id.* at *17.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at *18.

¹⁸⁰ *Id.* at *18-21.

¹⁸¹ *Id.* at *21.

5. Ireland v. AMR Corp.

On December 22, 2009, the plaintiff was a passenger on an American Airlines flight from Miami, Florida to Kingston, Jamaica when the aircraft was involved in a dramatic landing, i.e., it veered off the runway and crashed through a perimeter fence.¹⁸² The plaintiff claimed he suffered severe mental anguish, fear of death, and other physical injuries.¹⁸³ As in the *Narayanan* case, the court analyzed Article 35 of the Montreal Convention which stated that a claimant's rights to damages "shall be extinguished if an action is not brought within a period of two years" from the date of the aircraft's arrival at its destination or the date on which the aircraft ought to have arrived.¹⁸⁴ Under the terms of Article 35, the plaintiff had until December 22, 2011, to bring a claim under the Montreal Convention.¹⁸⁵

However, the plaintiff ultimately filed a lawsuit against American Airlines on December 21, 2012.¹⁸⁶ This was because American Airlines and its parent company filed for bankruptcy on November 29, 2011, triggering the automatic stay protection pursuant to 11 U.S.C. § 362(a) of the Bankruptcy Code which barred the commencement of a lawsuit during the pendency of the stay.¹⁸⁷ The plaintiff, relying on 11 U.S.C. § 108(c) of the Bankruptcy Code, asserted that Article 35's two year limitation period had been suspended by the automatic stay.¹⁸⁸ He contended that because American Airlines had filed for bankruptcy before the expiration of the limitations period, he had until thirty days after he received notice of the expiration of the stay to bring his claim and therefore his suit was timely filed.¹⁸⁹ American Airlines moved to dismiss the complaint as untimely.¹⁹⁰

The court sided with American Airlines that the claims were time barred.¹⁹¹ It found that the plaintiff had remedies to preserve his claim during the pending bankruptcy.¹⁹² For example,

¹⁸² Ireland v. AMR Corp., 20 F. Supp. 3d 341 (E.D.N.Y. 2014).

¹⁸³ *Id.* at 342.

¹⁸⁴ *Id.* at 343.

¹⁸⁵ *Id.* at 342–43.

¹⁸⁶ *Id.* at 342.

¹⁸⁷ *Id.* at 342–43.

¹⁸⁸ *Id.* at 344.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 342.

¹⁹² *Id.* at 348.

the plaintiff could have still filed a timely lawsuit within the two year period where upon the lawsuit would have been abated until the lifting of the stay.¹⁹³ The court also noted that plaintiff could have applied to the bankruptcy court for a motion to lift the stay for purposes of filing his lawsuit before the expiration of the two year period.¹⁹⁴ The court concluded that there was no section in the Bankruptcy Code which expressly tolled the statute of limitations in this context, and there was no potential unfairness to the plaintiff due to the stay.¹⁹⁵ Therefore, the court concluded that the plaintiff's complaint should be dismissed for his failure to file suit within the two year period following the crash.¹⁹⁶

C. THE WARSAW CONVENTION

1. *In re Air Crash at Georgetown, Guyana, on July 30, 2011*

The Warsaw Convention¹⁹⁷ was the centerpiece of *In re Air Crash at Georgetown, Guyana, on July 30, 2011*.¹⁹⁸ This personal injury action arose out of the crash landing of a Caribbean Airlines flight in the Republic of Guyana in 2011.¹⁹⁹ Caribbean Airlines moved to dismiss under Federal Rule of Civil Procedure 12(h)(3), "arguing that the court lacks subject matter jurisdiction over the plaintiffs' claims."²⁰⁰ More specifically, the airline asserted that the Warsaw Convention governs the claims and that "the treaty's forum provision deprives the court of subject matter jurisdiction."²⁰¹ Plaintiffs maintained that Guyana is not a party to the Warsaw Convention.²⁰²

The court succinctly stated, "[t]he issue . . . is whether Guyana is a party to the Warsaw Convention. . . . If Guyana is a party to the treaty, then the Warsaw Convention governs this case?and its forum provision would deprive the court of subject matter juris-

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ The Warsaw Convention is the common name for the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat 3000, 3014, T.S. No. 876 (entered into force in the United States in 1934, reprinted in 49 U.S.C. § 40105).

¹⁹⁸ *In re Air Crash at Georgetown, Guyana, on July 30, 2011*, 33 F. Supp. 3d 139 (E.D.N.Y. 2014).

¹⁹⁹ *Id.* at 142.

²⁰⁰ *Id.* at 143.

²⁰¹ *Id.*

²⁰² *Id.*

diction.”²⁰³ The issue is an artifact of Guyana’s colonial past. The one-time colony of the United Kingdom, British Guiana, as it was known, did not gain independence until 1966, which meant that for more than three decades after the United Kingdom signed the Warsaw Convention, the Convention applied to then-Guiana.²⁰⁴ Post-liberation, the issue was whether Guyana had affirmatively adopted the Warsaw Convention.²⁰⁵

Based on an interesting analysis of Guyana’s sovereign history since gaining independence, which no doubt reflected the rigorous historical research of all involved counsel, the court concluded that Guyana is in fact not a party to the Warsaw Convention and that the treaty is not the governing law of the case.²⁰⁶ The airline’s motion to dismiss was denied.²⁰⁷

D. FORUM NON CONVENIENS

1. Bochetto v. Piper Aircraft Co.

The lawsuit in *Bochetto* arose out of a September 15, 2009, crash of a Model PA 34-2023 Seneca V Aircraft that was being operated by a flight school in Portugal.²⁰⁸ The aircraft was manufactured by Piper Aircraft in Florida and was owned by two different American entities in 1998 and 2001 before it was ultimately sold to a Belgium company that then leased it to the flight school.²⁰⁹ The three occupants of the aircraft, all of foreign citizenry, died in the crash.²¹⁰

Three defendants filed a joint motion to dismiss the action on the grounds of *forum non conveniens* arguing that the litigation was a “textbook case” for dismissal on the doctrine of *forum non conveniens* because of the many relevant connections to Portugal.²¹¹ The trial court accepted the defendants’ arguments and dismissed the action subject to a stipulation by the defendants that could have allowed the matter to be re-filed in Portugal.²¹²

Plaintiffs appealed the trial court’s dismissal contending that it erroneously failed to give deference to their choice of forum

²⁰³ *Id.* at 142.

²⁰⁴ *Id.* at 144.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 153.

²⁰⁷ *Id.*

²⁰⁸ *Bochetto v. Piper Aircraft*, 94 A.3d 1044 (Pa. Sup. Ct. 2014).

²⁰⁹ *Id.* at 1045.

²¹⁰ *Id.*

²¹¹ *Id.* at 1047.

²¹² *Id.*

and misapplied Pennsylvania law regarding the pertinent factors that should have been considered in a *forum non conveniens* motion.²¹³ The Pennsylvania Superior Court held that the trial court's failure to consider the litigation's connections to the United States as a whole was an error.²¹⁴ It also deemed deficient the trial court's failure to discuss the pertinent public and private interest factors that could have weighed in favor of the plaintiffs' choice of forum instead of only focusing on those that weighed against the choice of forum.²¹⁵ Among the private interest factors the Superior Court identified as weighing in support of the plaintiffs' choice of forum was evidence relating to the design, manufacture and testing of the aircraft, which was located in the United States, and evidence relating to the aircraft's documentation of past maintenance, which was also located in the United States.²¹⁶ Among the public interest factors which were not considered was that none of the decedents, plaintiffs, or defendants were Portuguese.²¹⁷ As a result, the court vacated the trial court's order dismissing the action and remanded the case for a more comprehensive analysis of all relevant *forum non conveniens* factors.²¹⁸

The Bochetto case does not represent any reinterpretation of existing *forum non conveniens* law in Pennsylvania. Rather, it is a reminder that trial courts must conduct a complete and comprehensive analysis of all pertinent public and private interest factors and weigh these factors accordingly.

E. CONTINENTAL CONNECTION FLIGHT 3407

1. In re Air Crash near Clarence Center, New York on February 12, 2009

Decisions stemming from the notable Colgan Air crash continued in 2014. "On February 12, 2009 Continental Connection Flight 3407 ("Flight 3407"), operated by Colgan [Air Inc. (Colgan)], crashed on approach to the Buffalo-Niagara International Airport. Forty-nine passengers and crew died in the crash and there was one fatality on the ground. Also, two individuals

²¹³ *Id.*

²¹⁴ *Id.* at 1056.

²¹⁵ *Id.* at 1055–56.

²¹⁶ *Id.* at 1055.

²¹⁷ *Id.*

²¹⁸ *Id.* at 1056.

on the ground were injured.”²¹⁹ In a previous ruling, the court held “that the Federal Aviation Act of 1958 [] and Federal Aviation Regulations [] preempted all state standards of care.”²²⁰

In this matter, the “plaintiffs move[d the court] for an order imposing upon [Colgan] a federal general standard of care with respect to their claims of negligent hiring, training, selection and supervision.”²²¹ “Colgan argue[d] that any direct claims of liability against air carriers for negligent hiring, training and supervision may only be proven by a showing that the carrier violated specific provisions of the [Act] or FARS.”²²² Plaintiffs moved the court to “recognize a federal general standard of care which, if violated, would impose liability directly against Colgan for its alleged negligent hiring, training and supervision of the pilot and co-pilot of Flight 3407.”²²³

Plaintiffs asserted that the general standard of care enunciated in 14 C.F.R. § 91.13(a) governed their claims, providing that “[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”²²⁴ The court rejected this contention; “[g]iven the absence of a clear and unequivocal statutory mandate or judicial precedent,” it refused to impose a federal general standard of care upon the hiring, training and supervision of pilots.²²⁵ The court held that the proper standard of care must stem from the “specificity of the FARS that delineate the requirements that must, at a minimum, be satisfied in order for an air carrier to properly hire and train its pilots.”²²⁶ Acknowledging the breadth and scope of the regulatory scheme already controlling pilot hiring and training, it rejected the plaintiffs’ attempt to find an even higher standard of care within the Act.²²⁷ The court held that the standard of care is set by specific federal regulations and there is no general federal standard of care as plaintiffs argued which governed hiring or training.²²⁸

²¹⁹ *In re Air Crash near Clarence Center, New York* on February 12, 2009, 991 N.Y.S.2d 274, 275 (App. Div. 2014).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* (internal quotation marks omitted).

²²⁵ *Id.* at 277.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

F. ASIANA FLIGHT 214

1. *Lu v. Boeing Co.*

In *Lu v. Boeing Co.*, an Illinois district court addressed whether there was removal jurisdiction in several related personal injury cases arising from the crash of Asiana Airlines Flight 214 into a seawall at San Francisco International Airport on July 6, 2013.²²⁹ Boeing removed the case to federal court on the basis of admiralty jurisdiction and federal officer jurisdiction.²³⁰ The plaintiffs successfully remanded to state court, and Boeing filed a motion for reconsideration.²³¹

The central issue before the court was whether the tort actually occurred prior to the crash, such that the “injury became inevitable” while the plane was still over water.²³² Federal admiralty jurisdiction over a tort claim requires a showing “that the tort either occurred on navigable water or was caused by a vessel on navigable water.”²³³ Flight 214 was flying over San Francisco Bay as it approached the airport.²³⁴ The plane’s rear landing gear and tail hit the seawall and broke off, causing the plane to skid out of control on the runway.²³⁵ In support of its motion, Boeing underscored evidence and expert testimony that purported to show that the crash became inevitable while the plane was still over water.²³⁶

The court compared the circumstances of Flight 214 to two prominent cases that considered similar questions concerning the location of the tort where federal admiralty jurisdiction was applicable.²³⁷ In one of those cases, the aircraft’s vertical stabilizer detached several minutes after takeoff while over Jamaica Bay, leaving the aircraft incapable of flight and certain to crash.²³⁸ In another case, the critical loss of tail rotor control occurred over water, making it incapable of landing safely.²³⁹

²²⁹ *Lu v. Boeing Co.*, No. 13-7418, 2014 U.S. Dist. LEXIS 50210 (N.D. Ill. Apr. 11, 2014).

²³⁰ *Id.* at *5.

²³¹ *Id.* at *4–5.

²³² *Id.* at *10.

²³³ *Id.* at *9–10.

²³⁴ *Id.* at *4.

²³⁵ *Id.* at *5.

²³⁶ *Id.* at *6–9.

²³⁷ *Id.* at *15–16.

²³⁸ *Id.* at *10; see *In re Air Crash at Belle Harbor*, 02 MDL NO. 1448, 2006 U.S. Dist. LEXIS 27387 (S.D.N.Y. May 9, 2006).

²³⁹ *Lu*, 2014 U.S. Dist. LEXIS 50210 at *10; see *Brown v. Eurocopter S.A.*, 38 F. Supp. 2d 515 (S.D. Tex. 1999).

The court did not agree, as Boeing had asserted, that Flight 214's accident was set in motion over navigable water unlike these two cases where the flight was destined to crash and the injury was certain while the aircraft was over water.²⁴⁰

In its motion, Boeing argued that while the plane was still over water the aircraft's approach had already passed a point where correction was not feasible.²⁴¹ But the court found that the plane almost landed safely on the runway and missed it by only about five feet and that "[t]he aircraft was functional and responsive up until the crash."²⁴² Along those lines, the court also underscored that Boeing had assumed that the crash was the only possible outcome when it was possible that the engines could have responded with enough thrust to lift the plane a few more feet above the runway and avoid the accident altogether.²⁴³ The court noted that Boeing had impermissibly worked "backwards" from the crash and made a false assumption that the crash was at some point unavoidable.²⁴⁴ That method was not appropriate here when the aircraft still had an opportunity for a safe landing over the runway.²⁴⁵ The court found that Boeing's evidence did not persuade it that the tort was complete before the airplane struck the seawall or that the crash or resulting injuries were inevitable well before the crash itself on the seawall.²⁴⁶

Boeing also asserted federal officer jurisdiction because the plaintiffs' tort claims challenged work performed by Boeing employees, who certified the aircraft's safety according to a highly regulated federal process.²⁴⁷ In short, Boeing contended that whenever airworthiness is challenged, certification is likewise challenged. The court disagreed, finding that Boeing "has not offered any authority for its idea that a lawsuit against an airplane manufacturer for product liability and negligence is the same as a suit against the manufacturer's employees for negli-

²⁴⁰ *Lu*, 2014 U.S. Dist. LEXIS 50210 at *15-17.

²⁴¹ *Id.* at *6-8.

²⁴² *Id.* at *13, *22.

²⁴³ *Id.* at *13-14.

²⁴⁴ *Id.* at *15-16.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at *22.

²⁴⁷ *Id.* at *23.

gent certification.”²⁴⁸ Boeing’s motion for reconsideration was therefore denied.²⁴⁹

G. MALAYSIA FLIGHT 370

1. Fatt v. The Boeing Company

As has been well documented, on March 8, 2014, Malaysian Airlines Flight 370 disappeared en route from Kuala Lumpur, Malaysia to Beijing, China.²⁵⁰ To date, the bulk of the aircraft has not been located, and all 239 passengers and crew onboard are believed to be dead.²⁵¹

Lee Khim Fatt, the husband of a deceased crew member, Foong Wai Yueng, obtained an order in Illinois state court appointing him as a special administrator of Ms. Yueng’s estate.²⁵² On that same date, he filed a verified petition for discovery pursuant to Illinois Supreme Court Rule 224.²⁵³ Rule 224 “permits a person to file an independent action for discovery for the limited purpose of ascertaining the identity of one who may be responsible ‘in damages,’” and allows for an order which will “limit discovery to the identification of responsible persons and entities.”²⁵⁴

In his petition, Mr. Fatt alleged that the accident aircraft was manufactured by Boeing Company and that it was operated by Malaysian Airlines.²⁵⁵ He alleged that he reasonably believed that he had a viable cause of action for negligence against additional unknown entities who proximately caused his wife’s death.²⁵⁶ In addition, he asserted that Boeing was potentially in possession of records and other information identifying individuals and entities who owned, operated, leased, repaired, and maintained the subject Boeing aircraft prior to and at the time of the accident.²⁵⁷ Accordingly, he requested an order requiring Boeing to provide him with documents identifying the names,

²⁴⁸ *Id.*

²⁴⁹ *Id.* Notably, Boeing filed a Notice of Appeal on April 15, 2014, appealing the matter to the U.S. Court of Appeals for the Seventh Circuit.

²⁵⁰ Fatt v. Boeing Co., No. 1-14-1108, 2014 Ill. App. Unpub. LEXIS 2645, at *2 (Ill. App. Nov. 26, 2014).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at *8.

²⁵⁵ *Id.* at *2.

²⁵⁶ *Id.* at *3.

²⁵⁷ *Id.*

addresses, and telephone numbers of all known owners of the aircraft from the date of the manufacturer to the present, sales agreements, lease agreements, and entities that performed maintenance or repair work.²⁵⁸ Additionally, he requested an order for production of documents naming the identity of every individual who provided the pilots and co-pilots with any training related to the subject aircraft and anyone who approved the airworthiness of the accident aircraft.²⁵⁹

With respect to Malaysian Airlines, Mr. Fatt requested an order requiring the disclosure of documents identifying persons or entities in possession of information or documents pertaining to the company's safety practices, any training of the subject crew, the airline's physical and psychological evaluations of the crew, a detailed cargo listing, and "squawk" sheets for the previous year.²⁶⁰

Without holding a hearing, the circuit court of Illinois *sua sponte* issued an order finding the petition exceeded the scope of allowable discovery as set forth in Rule 224.²⁶¹ In dismissing the petition, the court further noted that the law firm representing the petitioner had previously filed similar petitions on three separate occasions (one which involved Flight 370 and two others).²⁶² The court noted that all of those prior petitions were dismissed as improper.²⁶³ The circuit court warned the law firm that filed the petition that it would be subject to sanctions upon the filing of any similar petitions that were clearly outside the scope of Rule 224.²⁶⁴

On appeal, the petitioner contended that the court erred both in dismissing the petition without a hearing as is required pursuant to Rule 224, as well as on the merits since there existed, at the very least, a split in authority as to whether the discovery petition should be granted where the identity of at least one of the defendants is known.²⁶⁵ Boeing countered that the circuit court was within its right to dismiss the petition without a

²⁵⁸ *Id.*

²⁵⁹ *Id.* at *3-4.

²⁶⁰ *Id.* at *5.

²⁶¹ *Id.*

²⁶² *Id.* at *6.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at *7-8.

hearing and requested the imposition of sanctions on the petitioner.²⁶⁶

The appellate court held that the circuit court was without authority to deny or grant the petition *sua sponte* without first holding a hearing according to the Illinois rules.²⁶⁷ The court noted that the procedural requirements of the rule were not complex, i.e., “[a] hearing must be held before the court can grant or deny a Rule 224 petition.”²⁶⁸ Accordingly, it reversed and remanded the court’s dismissal of the petition on procedural grounds.²⁶⁹ However, in doing so, it expressly reminded the petitioner’s attorneys that they were on notice of the trial court’s warning that going forward with any potentially frivolous discovery petitions may subject them to sanctions.²⁷⁰

H. GOVERNMENTAL LIABILITY

1. *Turturro v. United States of America, et al.*

On May 22, 2008, student pilot Charles Angelina was conducting pattern work at Northeast Philadelphia Airport with his flight instructor Adam Braddock.²⁷¹ After performing a touch-and-go on Runway 24, the local controller instructed the pilots, who were operating a Grumman AA-1C, to set up for left traffic on intersecting Runway 33.²⁷² While the aircraft was on “final” during its second touch-and-go on Runway 33, an Agusta helicopter operated by Agusta Aerospace was hovering east of Runway 33 requesting permission to depart the airport in a westerly direction.²⁷³ The local controller instructed the Agusta helicopter to momentarily hold its hover position.²⁷⁴ Soon after, the local controller cleared the Agusta on course for a westerly departure (specifically, northwesterly) while also indicating previously to the Agusta that the Grumman would be in a “left downwind departure.”²⁷⁵

²⁶⁶ *Id.* at *8.

²⁶⁷ *Id.* at *10.

²⁶⁸ *Id.* at *9.

²⁶⁹ *Id.* at *10.

²⁷⁰ *Id.*

²⁷¹ *Turturro v. United States, et al.*, No. 10-2460 2014, U.S. Dist. LEXIS 118044, at *5 (E.D. Pa. Aug. 22, 2014).

²⁷² *Id.* at *6–7.

²⁷³ *Id.* at *7–8.

²⁷⁴ *Id.* at *8.

²⁷⁵ *Id.* at *8–9.

During its subsequent climb out from Runway 33, the local controller instructed the Grumman to “make right traffic.”²⁷⁶ The Grumman initiated its right turn at an altitude of 200–300 feet but then was seen climbing at an abnormally slow speed.²⁷⁷ It subsequently stalled and crashed into a nearby parking lot killing both pilots.²⁷⁸ The Agusta helicopter was about 2,678 feet away and traveling at a speed of 5 to 7 knots when the “make right traffic” instruction was given.²⁷⁹ Upon seeing the Grumman turn right, the Agusta flight instructor (having not heard the “make right traffic” instruction and surprised by the Grumman’s right hand turn toward their aircraft) executed a “quick stop” immediately halting the forward momentum of the aircraft.²⁸⁰

The estates of Mr. Braddock and Mr. Angelina filed separate (and later consolidated) lawsuits against Agusta and the United States of America (i.e. the Federal Aviation Administration) in the Eastern District of Pennsylvania.²⁸¹ The plaintiffs claimed that the United States was negligent inasmuch as the traffic controller should have instructed the Grumman to make right traffic “speed and altitude permitting.”²⁸² Without that qualifying language, the plaintiffs argued that the Grumman believed it had to make the immediate turn at a critical phase of flight.²⁸³ After initially contending that the Grumman had experienced wake vortices from either the Agusta or perhaps an earlier departed business jet, the plaintiffs relied heavily on a “startle reaction” theory.²⁸⁴ The plaintiffs claimed that the Grumman pilots turned right in response to the controller’s instruction and were “startled” to view the westerly bound Agusta headed toward them, which caused the student pilot to yank back on the controls causing the crash.²⁸⁵ Plaintiffs claimed that the Agusta was also at fault for contributing to this collision hazard by improperly requesting a westerly departure.²⁸⁶

²⁷⁶ *Id.* at *9.

²⁷⁷ *Id.* at *10.

²⁷⁸ *Id.* at *13.

²⁷⁹ *Id.* at *12–13.

²⁸⁰ *Id.* at *12.

²⁸¹ *Id.* at *2–3.

²⁸² *Id.* at *39.

²⁸³ *Id.*

²⁸⁴ *Id.* at *49.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at *35.

Defendants filed summary judgment seeking to dismiss all claims, and the court granted summary judgment dismissing the complaint.²⁸⁷ The court found no prohibition on the controller's manner of communication with the Grumman pilot during its departure climb and rejected the argument that the "make right traffic" communication as issued by the controller conveyed any sense of urgency.²⁸⁸ In short, the controller did not breach any duty of care to the decedents.²⁸⁹ The court held that the plaintiffs had failed to establish that the traffic controller's action caused the Grumman to stall and crash.²⁹⁰ Nor was there any factual support that the Agusta's position or direction of flight created a "startle reaction."²⁹¹ The court held that the plaintiffs could not even establish that either of the Grumman pilots ever perceived the Agusta.²⁹² Furthermore, it found that neither the aircraft controller's traffic instructions nor the departure route of the Agusta created a verifiable collision hazard or contributed to any hypothetical "startle" effect.²⁹³

Plaintiffs have filed a notice of appeal appealing the case to the U.S. Court of Appeals for the Third Circuit.²⁹⁴

2. *Pellegrino v. United States of America*

In *Pellegrino*, the plaintiff brought suit under the Federal Tort Claims Act alleging property damage, false arrest and imprisonment, malicious prosecution, and civil conspiracy in connection with an airport Transportation Security Administration (TSA) security screening.²⁹⁵ The United States has waived its sovereign immunity in instances where false arrest and imprisonment, malicious prosecution, and civil conspiracy claims are brought against "investigative or law enforcement officers" of the federal government, and "law enforcement officers" are defined as those entitled to execute searches, seize evidence, or make ar-

²⁸⁷ *Id.* at *65.

²⁸⁸ *Id.* at *40-41.

²⁸⁹ *Id.* at *42.

²⁹⁰ *Id.* at *42-43.

²⁹¹ *Id.* at *49, *52-53.

²⁹² *Id.* at *54.

²⁹³ *Id.* at *36, *52-53.

²⁹⁴ *Turturro v. United States, et al.*, 2014 U.S. Dist. LEXIS 118004, *appeal docketed*, No. 14-3834 (3d Cir. Sept. 11, 2014).

²⁹⁵ *Pellegrino v. United States*, No. 09-5505, 2014 U.S. Dist. LEXIS 52468, at *11 (E.D. Pa. Apr. 16, 2014).

rests.²⁹⁶ The court held that TSA officers who conduct airport screenings do not fall within the law enforcement exception articulated in 28 U.S.C. § 2680(h), particularly because this proviso was enacted as a response to specific egregious behavior during federal law enforcement raids and was not intended to be expansive enough to apply to airport security screeners.²⁹⁷ Consequently, the court lacked jurisdiction to entertain these claims and dismissed them.²⁹⁸

However, the court declined to dismiss the plaintiff's property damage claim as precluded by 28 U.S.C. § 2680(h).²⁹⁹ The property damage was unrelated to the false arrest and imprisonment claims; rather, this claim arose from a TSA agent's actions during the screening of the plaintiff's property, while the other claims arose from different, separate activity that allegedly occurred after the screening was complete.³⁰⁰

I. AVIATION AND TRANSPORTATION SECURITY ACT

1. *Air Wisconsin v. Hoeper*

The defendant, a Federal Flight Deck Officer (FFDO) employed by the plaintiff as a pilot, was required to become certified to fly a new aircraft, a task that he thrice failed.³⁰¹ The plaintiff agreed to give the defendant a fourth, final chance at certification, during which he performed poorly and was verbally abusive to his instructor.³⁰² At the same time, the supervisor reported the defendant's behavior to his supervisor, and the defendant boarded a flight home.³⁰³ The plaintiff's leadership then reviewed the incident and determined, based on the defendant's outburst, his imminent termination, a history of assaults by other disgruntled airline employees, and the defendant's status as an FFDO, that the defendant may be armed and unstable.³⁰⁴ As a result, the plaintiff notified the TSA, advising that

²⁹⁶ 28 U.S.C. § 2680(h); 28 U.S.C. § 2680(h); *Pellegrino*, 2014 U.S. Dist. LEXIS 52468, at *18.

²⁹⁷ *Pellegrino*, 2014 U.S. Dist. LEXIS 52468, at *18.

²⁹⁸ *Id.* at *21.

²⁹⁹ *Id.* at *22.

³⁰⁰ *Id.*; Defendant's subsequent motion to dismiss the property damage claim based on lack of evidence was also denied. *Pellegrino v. United States*, 2014 U.S. Dist. LEXIS 111942, at *32–34 (E.D. Pa. Aug. 12, 2014).

³⁰¹ *Air Wisconsin v. Hoeper*, 134 S. Ct. 852, 858 (2014).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 859.

the defendant was "an FFDO who may be armed," that the airline was "concerned about his mental stability and the whereabouts of his firearm," and that "an unstable pilot in the FFDO program was terminated today."³⁰⁵ In response, the TSA removed the defendant from his flight, searched him, and questioned him about the location of his gun.³⁰⁶ The defendant sued for defamation, and the plaintiff moved for summary judgment, alleging immunity under the Aviation and Transportation Security Act (ATSA).³⁰⁷ The trial court denied summary judgment, finding that whether the plaintiff made a disclosure to the TSA about the defendant with actual knowledge that the disclosure was "false, inaccurate, or misleading" or made "with reckless disregard as to its truth or falsity" was a question for the jury.³⁰⁸ The jury found in favor of the defendant, a result affirmed by the Colorado Court of Appeals.³⁰⁹ The Colorado Supreme Court also affirmed, but held that the trial judge erred in submitting the issue of ATSA immunity to the jury.³¹⁰ Rather, the Colorado Supreme Court reasoned, ATSA immunity is a question of law to be determined by the trial court prior to trial.³¹¹ Nonetheless, the Colorado Supreme Court affirmed, holding that, though the defendant's conduct may have warranted a report to the TSA, the plaintiff's statements "overstated the events to such a degree that they were made with reckless disregard as to their truth or falsity."³¹²

The Supreme Court heard the case to evaluate whether, in determining ATSA immunity, the trial court was also required to determine the material falsity of the statements.³¹³ The Court held that the trial court was required to determine that the defendant's statements were materially false.³¹⁴ Congress patterned the exception to ATSA immunity, the Court reasoned, on the "actual malice" standard articulated in *New York Times Co. v. Sullivan*,³¹⁵ and actual malice requires material falsity.³¹⁶ Be-

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 859-60.

³⁰⁹ *Id.* at 860.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 861.

³¹⁴ *Id.*

³¹⁵ 376 U.S. 254, 279 (1964).

³¹⁶ *Hooper*, 134 S. Ct. at 861.

cause the actual malice standard does not encompass materially true statements made recklessly, the Court held that ATSA immunity extended to materially true statements made recklessly.³¹⁷

The Court then held that the Colorado Supreme Court's analysis of material falsity was erroneous, and found that the plaintiff was entitled to ATSA immunity.³¹⁸ The Court noted that a disclosure is "materially false" if a reasonable TSA officer would consider the omission or misrepresentation important in determining how to respond to a situation.³¹⁹ The Court found that a reasonable TSA officer, if advised that the defendant was an FFDO who was upset about losing his job, would have investigated the whereabouts of Defendant's weapon.³²⁰ This interpretation, the Court reasoned, supported the purpose of ATSA immunity, namely to encourage air carriers and their employees to provide the TSA with prompt information about threats, often in high-pressure situations.³²¹ Further, the plaintiff's report that the defendant had been terminated, even though the defendant had not yet been fired, was also subject to immunity.³²² Though the defendant had not been terminated at the time of the statement, the firing was all but imminent, and even the defendant acknowledged that the final attempt to become certified was "final" and provided at the plaintiff's discretion.³²³ In deciding how to react to this situation, the Court held, no reasonable TSA officer would care if an upset, potentially armed airline employee had just been terminated or knew that this termination was imminent.³²⁴ Lastly, the Court held that the plaintiff's statement about the defendant's mental state fell under the umbrella of ATSA immunity, even though these concerns may have been phrased in a less inflammatory way.³²⁵ Specifically, the Court held that a statement that would otherwise qualify for ATSA immunity should not lose that immunity because of a minor imprecision, as long as "the gist" of the statement was accurate.³²⁶

³¹⁷ *Id.* at 862.

³¹⁸ *Id.* at 867.

³¹⁹ *Id.* at 864.

³²⁰ *Id.* at 865.

³²¹ *Id.* at 865.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 865–66.

³²⁶ *Id.* at 866.

J. CONFLICT OF LAWS

1. *In re Air Crash Near Rio Grande, Puerto Rico* on December 3, 2008

This case arose when an aircraft, transporting passengers both domiciled in Ohio, crashed in Puerto Rico killing the passengers.³²⁷ The pilot, domiciled in the U.S. Virgin Islands, was operating under Visual Flight Rules (VFR), which forbade flying into clouds or areas of reduced visibility unless he obtained permission from air traffic control to do so.³²⁸ The pilot did not advise air traffic control of visibility problems until right before the plane crashed.³²⁹

The United States sought summary judgment with regard to damages, alleging that, under the doctrine of *lex loci delicti*, the law of the place of the tort applies; thus, under Puerto Rico law, the plaintiffs' claim for lost future earnings was impermissible.³³⁰ The plaintiffs countered that Puerto Rico had replaced *lex loci delicti* with a "dominant contacts" approach and that the court should apply Eleventh Circuit precedent, which required the application of the law of "the least interested jurisdiction with the least restrictive damages law," namely the law of Ohio and the U.S. Virgin Islands (where the pilot and decedents resided).³³¹

Even if the "dominant contacts" approach applied in Puerto Rico, the court found that Puerto Rico damages law applied.³³² First, the fact that the plaintiffs were not Puerto Rico domiciliaries did not outweigh Puerto Rico's interest in preventing air crashes and ensuring reparations were made for wrongful acts.³³³ Further, dominant contact also existed in Puerto Rico because the plaintiffs alleged the accident was caused by air traffic control in Puerto Rico and did not assert that the accident location was fortuitous.³³⁴ Lastly, the court rejected the application of Eleventh Circuit law because the Federal Tort Claims Act looked to the law of the state where the act occurred, and this

³²⁷ *In re Air Crash Near Rio Grande, Puerto Rico* on Dec. 3, 2008, No. 11-md-2246-MARRA, 2014 U.S. Dist. LEXIS 89435, at *5 (S.D. Fla. Jul. 1, 2014).

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at *7, *13.

³³¹ *Id.* at *13-14.

³³² *Id.* at *14.

³³³ *Id.* at *15 (citing *Bonn v. P.R. Int'l Airlines, Inc.*, 518 F.2d 89, 92 (1st Cir. 1975)).

³³⁴ *Id.* at *16.

case was only before the Eleventh Circuit due to assignment by the judicial panel on multidistrict litigation.³³⁵

The plaintiffs moved for reconsideration, arguing that the court erred in not applying the Restatement (Second) of Conflict of Laws, which requires application of the law of the jurisdiction that affords the plaintiffs the greatest relief, namely Ohio, as it had a more dominant connection to the case than Puerto Rico and would provide the plaintiffs greater relief than Puerto Rico law.³³⁶ The court disagreed.³³⁷ First, the court rejected the “greatest relief” argument, finding that the Restatement was not designed to favor one party over another or provide a plaintiff with the largest potential recovery, but rather was aimed at harmonizing interstate and international systems of law.³³⁸ The court also found that Puerto Rico’s connection to this case was substantial enough to warrant the application of its law.³³⁹ Specifically, the Restatement notes that the local law of the state where the injury occurred determines the parties’ rights and liabilities, and another state’s law only applies if that other state had a “more significant relationship” to the incident and parties.³⁴⁰ The court held that Puerto Rico was the place of injury, place of the conduct causing the injury, and the center of the parties’ relationship because the plaintiffs alleged that the accident occurred in Puerto Rico, with a plane en route to a destination in Puerto Rico, due to the actions of air traffic control in Puerto Rico.³⁴¹ The Restatement, and the court, gave no weight to Ohio as being the domicile of most of the decedents and the site of the survivors’ pecuniary loss because the place of injury is not the place where a death results in pecuniary loss to the decedents’ beneficiaries.³⁴²

³³⁵ *Id.*

³³⁶ *In re* Air Crash Near Rio Grande, Puerto Rico on Dec. 3, 2008, No. 11-md-2246-MARRA, 2014 U.S. Dist. LEXIS 115841 at *7–9 (S.D. Fla. Aug. 20, 2014).

³³⁷ *Id.* at *9.

³³⁸ *Id.*

³³⁹ *Id.* at *10.

³⁴⁰ *Id.* at *9.

³⁴¹ *Id.* at *10.

³⁴² *Id.* at *11.

K. PERSONAL JURISDICTION

1. *Walden v. Fiore*

In *Walden v. Fiore*,³⁴³ a local police officer, Anthony Walden, was working at the Atlanta Hartsfield-Jackson Airport as a deputized agent of the Drug Enforcement Administration (DEA). (These events occurred in 2006.) His duties there involved investigative stops and other law enforcement functions in support of the DEA's mission.³⁴⁴ Officer Walden encountered a couple who were traveling en route to Las Vegas, Nevada, from San Juan, Puerto Rico. Having received notification from DEA agents in San Juan that the couple was traveling with close to \$97,000 in cash, Officer Walden approached the couple at their Atlanta departure gate. Apparently unsatisfied with the travelers' explanations concerning their activities ("professional gamblers" who were carrying their "gambling bank"), a drug-sniffing dog was used to conduct a sniff test, whereafter Officer Walden seized the funds and informed the couple that the funds would be returned if they could "prove a legitimate source for the cash."³⁴⁵ They departed for Las Vegas, and the next day Officer Walden was contacted by their attorney, seeking their funds.³⁴⁶

Officer Walden helped draft an affidavit to show probable cause for forfeiture of the funds, which was provided to the office of the United States Attorney in Georgia.³⁴⁷ Ultimately, no forfeiture complaint was filed, and the DEA returned the funds six months after seizure. The couple alleged that the affidavit was "false and misleading because [Officer Walden] had misrepresented the encounter at the airport and omitted exculpatory information regarding the lack of drug evidence and the legitimate source of the funds."³⁴⁸ They filed suit against Officer Walden in the United States District Court for the District of Nevada, seeking money damages for violation of their Fourth Amendment rights under *Bivens v. Six Unknown Federal Narcotics Agents*.³⁴⁹

³⁴³ 134 S. Ct. 1115 (2014).

³⁴⁴ *Id.* at 1119.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 1119–20.

³⁴⁹ *Id.* (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)).

The district court granted Officer Walden's motion to dismiss on grounds that personal jurisdiction was lacking. The search and seizure of cash in Georgia was insufficient as a basis upon which to exercise personal jurisdiction in Nevada.³⁵⁰ The Court of Appeals for the Ninth Circuit reversed, finding that Officer Walden's submission of the affidavit was "'expressly aimed'" at Nevada "with knowledge that it would affect persons with a 'significant connection' to Nevada."³⁵¹ Also noting that the delay in returning the seized funds caused "'foreseeable harm'" in Nevada, the appellate court found that the exercise of personal jurisdiction was reasonable.³⁵²

Justice Thomas delivered the opinion of the Court. In a particularly instructive clarification of minimum contacts, the Court explained that the "minimum contacts analysis looks to the defendant's contact with the forum State itself, not the defendant's contacts with persons who reside there."³⁵³ "[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State. . . . Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties."³⁵⁴ "[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him."³⁵⁵

Turning to the record, the Court concluded, "Petitioner never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens—whether the *defendant's* actions connect him to the *forum*—petitioner formed no jurisdictionally relevant contacts with Nevada."³⁵⁶ "Petitioner's relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction."³⁵⁷

³⁵⁰ *Id.* at 1120.

³⁵¹ *Id.* (quoting *Fiore v. Walden*, 688 F.3d 558, 581 (9th Cir. 2011)).

³⁵² *Id.* (citing *Fiore*, 688 F.3d at 582, 585).

³⁵³ *Walden*, 134 S. Ct. at 1122.

³⁵⁴ *Id.* (internal citation omitted) (emphasis in original).

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 1124.

³⁵⁷ *Id.* at 1125.

2. *Martinez v. Aero Caribbean*

An airplane designed by defendant ATR and owned by various defendants (the Cuban defendants) crashed, killing all passengers and prompting a wrongful death and negligence suit.³⁵⁸ ATR moved to dismiss the complaint before the Cuban defendants were sued, and the U.S. District Court for the Northern District of California granted the motion, but only as to ATR.³⁵⁹ The plaintiffs appealed this decision to the Ninth Circuit, but their claims against the Cuban defendants remained pending before the district court.³⁶⁰ The court concluded that the plaintiffs' appeal was premature because the district court's order granting ATR's motion to dismiss was not an appealable final judgment.³⁶¹ Specifically, the court noted that it had "jurisdiction over appeals from final judgments that dispose of all claims with respect to all parties."³⁶² Though the court recognized that an exception to this rule applies when an action is dismissed as to all defendants who have been served and only unserved defendants remain, the court cautioned that this exception does not apply "where no final judgment is entered and it is clear from the course of proceedings that further adjudication is contemplated."³⁶³ The district court's course of conduct, namely entering final judgment with respect to ATR and not with respect to the Cuban defendants and setting a deadline for the plaintiffs to move for default judgment against the Cuban defendants, suggested that the plaintiffs were continuing their case against the Cuban defendants, and the order dismissing the plaintiffs' claims against ATR was not intended to finally dispose of the whole case.³⁶⁴ Consequently, the Ninth Circuit concluded that because the judgment in the pending district court case was not final, it did not have jurisdiction.³⁶⁵

³⁵⁸ *Martinez v. Aero Caribbean*, 577 Fed. Appx. 682, 682 (9th Cir. 2014).

³⁵⁹ *Id.* at 682–83.

³⁶⁰ *Id.* at 683.

³⁶¹ *Id.*

³⁶² *Id.* (citing *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 987 (9th Cir. 2009)).

³⁶³ *Id.* (citing *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 872 (9th Cir. 2004) (emphasis omitted)).

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 684.

3. Central Virginia Aviation, Inc. v. N. American Flight Services, Inc.

Plaintiff, a Virginia corporation with its principal place of business in Virginia, and Defendant, a New York corporation with its principal place of business in New York, were both engaged in the buying, selling, and leasing of aircraft.³⁶⁶ Defendant placed an airplane up for auction on eBay, and Plaintiff won the auction, bidding \$125,100.³⁶⁷ Plaintiff's president inspected the airplane at Defendant's location in New York, and Plaintiff made a deposit toward the purchase in an escrow account.³⁶⁸ Two days after the inspection, Defendant entered into a contract for the sale of that airplane to Plaintiff's customer (the third party) for \$195,000.³⁶⁹ Defendant then advised Plaintiff that, after the auction ended, Defendant received two other offers, and Plaintiff had two days to pay the increased price or the airplane would be sold "to the next guy in line."³⁷⁰ Plaintiff alleged that, after Defendant learned of the contract of sale between Plaintiff and the third party, Defendant breached the contract with Plaintiff in order to sell the airplane directly to the third party, removing Defendant as the middleman.³⁷¹ Defendant brought suit for breach of contract, tortious interference with the contract between Plaintiff and the third party, and tortious interference with business expectancy.³⁷² Defendant moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) due to lack of personal jurisdiction.³⁷³

The court considered whether it could assume jurisdiction over Defendant, a New York corporation, under Virginia's long-arm statute, Va. Code § 8:01-328.1(A), which confers jurisdiction over "nonresidents who engage in some purposeful activity in Virginia, to the extent permissible under the Due Process Clause" of the U.S. Constitution.³⁷⁴

Analyzing Defendant's contacts with Virginia under the long-arm statute, the court was tasked with determining whether

³⁶⁶ Cent. Va. Aviation, Inc. v. N. Am. Flight Servs., Inc., 23 F. Supp. 3d 625, 627 (E.D. Va. 2014).

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at 628.

³⁷⁴ *Id.* at 628-29.

Plaintiff had made a *prima facie* case that each of its claims arose out of Defendant's "[c]ausing tortious injury by an act or omission" in Virginia.³⁷⁵ Plaintiff alleged that "Defendant's contacts with Virginia were not random, fortuitous, or attenuated, but rather were intentional and targeted toward Virginia. . . ."³⁷⁶ The court rejected this argument because Plaintiff failed to allege that Defendant caused "tortious injury by an act or omission" while Defendant was in Virginia.³⁷⁷ Indeed, Plaintiff's complaint did not allege a single act that Defendant performed in Virginia; the only transaction mentioned in the complaint was the eBay auction.³⁷⁸ There was no allegation that the auction was directed at Virginia; rather, the auction was available to anyone with an Internet connection.³⁷⁹ The auctioned airplane was located in New York, Defendant accepted the winning bid from New York, and Plaintiff's president traveled to New York to inspect the plane.³⁸⁰ The Complaint did not allege that the third party was a Virginia resident and did not allege that Defendant had direct contact with the third party.³⁸¹ Consequently, there was no specific tortious conduct alleged that linked Defendant to Virginia.³⁸² Instead, the complaint alleged that, after learning about the contract between Plaintiff and the third party, Defendant breached its contract with Plaintiff so as to allow the plane to be sold directly to the third party, without referring to forum.³⁸³

Next, the court held that personal jurisdiction may not satisfy due process.³⁸⁴ Under the Due Process Clause, personal jurisdiction could be exercised over a non-resident defendant only if the defendant has "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."³⁸⁵ In making this determination, the court considered (1) the extent to which Defendant "purposefully avail[ed] itself of the privilege of conducting activities" in Virginia; (2) whether Plaintiff's

³⁷⁵ *Id.* at 629 (citing Va. Code § 8:01-328.1(A)(3)).

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 629-30.

³⁸⁰ *Id.* at 630.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.* (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

claims arose out of those activities directed at Virginia; and (3) “whether the exercise of personal jurisdiction would be ‘constitutionally reasonable.’”³⁸⁶

Because Plaintiff failed to allege a single fact to show Defendant had any contact with Virginia, and no part of Defendant’s course of conduct occurred in Virginia, insufficient contacts existed to confer personal jurisdiction.³⁸⁷ The only action that occurred in Virginia—Plaintiff’s alleged injury—was insufficient to support the exercise of jurisdiction.³⁸⁸ The court concluded that Defendant’s actions in New York did not create sufficient contacts with Virginia simply because Defendant allegedly directed its conduct at Plaintiff, whom Defendant knew had connections in Virginia.³⁸⁹ Such reasoning would improperly attribute Plaintiff’s Virginia connections to Defendant.³⁹⁰ Accordingly, the court found that Defendant did not have minimum contacts with Virginia because it did not “‘purposefully avail’ itself of the privilege of conducting activities” in Virginia, and thus, the court did not consider steps two or three of the due process inquiry.³⁹¹ The court held that attaching personal jurisdiction to Defendant would violate due process and dismissed the complaint.³⁹²

4. SD Holdings, LLC v. Aircraft Owners & Pilots Association, Inc.

The plaintiff (SD) initiated a patent infringement action against the defendant (the Association), and the Association moved to dismiss due to lack of personal jurisdiction.³⁹³ The complaint asserted that the District Court of Oregon had personal jurisdiction over the Association under the Oregon long-arm statute, Oregon Rule of Civil Procedure 4L, based on Association’s activities in Oregon.³⁹⁴

Determining if personal jurisdiction exists over an out-of-state defendant involves two inquiries: (1) whether the forum state’s

³⁸⁶ *Id.* (citing *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)).

³⁸⁷ *Id.* at 631.

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *SD Holdings, LLC v. Aircraft Owners & Pilots Ass’n, Inc.*, No. 13–01296, 2014 WL 3667881, at *1 (D. Or. July 22, 2014); *see also* Fed. R. Civ. P. 12(b)(6).

³⁹⁴ *SD Holdings*, 2014 WL 3667881, at *2.

long-arm statute permits the assertion of jurisdiction and (2) whether asserting such jurisdiction violates federal due process; that is, whether a defendant, through conduct and connection with the forum state, purposefully availed itself of the privilege of conducting activities within the forum state to such a degree that the defendant invokes the benefits and protections of the forum's laws and should reasonably anticipate being haled into court there.³⁹⁵ There are two types of personal jurisdiction: general jurisdiction, which exists if the defendant's contacts with the forum are sufficiently continuous and systematic to establish a physical presence in the forum, and specific jurisdiction, which exists if defendant purposefully directed its activities at residents of the forum and the claims asserted in the litigation arise out of or are related to the defendant's forum-related activities.³⁹⁶

The court first analyzed the Association's contacts with Oregon.³⁹⁷ The Association was a New Jersey corporation headquartered in Maryland.³⁹⁸ The Association had members in Oregon, but had no physical presence in Oregon, was not registered to conduct business in Oregon, and had no registered agents, employees, or sales representatives in Oregon.³⁹⁹ SD argued that the Association had sufficient continuous and systematic contacts with Oregon because the Association presented seminars in Oregon, was licensed with the Oregon Insurance Division, solicited pilots to sell its products in Oregon, had Oregon citizens as dues-paying members, advertised and provided services to Oregon citizens, and was available in Oregon by means of its website, which enabled users to create an account and listed a number of flying clubs in Oregon.⁴⁰⁰ Further, SD alleged that the Association's advertising representative made numerous trips to Oregon to solicit advertising dollars from SD, the Association's president visited SD's aviation club in Oregon to promote the Association's services, and the Association e-mailed an

³⁹⁵ *Id.* at *3. The court also acknowledged that federal law governed the question of whether a district court had personal jurisdiction over a defendant in a patent suit.

³⁹⁶ *Id.* at *4 (citing *LSI Indus. v Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at *2-3, *5.

SD shareholder (Stenberg), offering a free trial membership and other solicitations.⁴⁰¹

The court held the Association's contacts with Oregon were insufficient to confer general jurisdiction.⁴⁰² With regard to the website, the ability of Oregon residents to access a passive website available to customers throughout the country was insufficient, standing alone, to establish a persistent course of conduct in a state necessary for general jurisdiction, particularly because the Association's website was not the "highly interactive, transaction-oriented" type sufficient to support general long-arm jurisdiction.⁴⁰³ Further, the "unilateral" actions of individuals accessing the website, creating accounts, and forwarding payment to the Association via the internet did not constitute conduct within Oregon, and the actions of members obtaining information from the Association through the website did not establish that the Association had a persistent course of conduct within Oregon.⁴⁰⁴ The Association's e-mail and postal mail solicitations also did not support general jurisdiction.⁴⁰⁵ If these were received as part of a nationwide advertising campaign directed at residents of all fifty states, rather than just the forum state, this was not tantamount to the intentional contact with the forum required to create general jurisdiction.⁴⁰⁶ Further, if the solicitations targeted just a single individual, this was insufficient to create a continuous and systematic relationship with Oregon.⁴⁰⁷ In addition, SD and the Association representatives' advertising and promotional meeting, as well as attendance by SD's representatives at an Association event in Oregon, were more properly characterized as occasional and isolated activities rather than regular and continuous business contacts that created a physical presence within the state.⁴⁰⁸

The court held that specific jurisdiction also did not exist.⁴⁰⁹ The Association's website, available to all U.S. residents, was not purposefully directed at Oregon residents and did not support specific jurisdiction.⁴¹⁰ Even assuming the Association's personal

⁴⁰¹ *Id.* at *3.

⁴⁰² *Id.* at *6–7.

⁴⁰³ *Id.* at *6.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at *7.

⁴⁰⁶ *Id.* (citation omitted).

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at *8.

⁴¹⁰ *Id.* at *7.

and written contacts with SD's representatives were purposefully directed at Oregon, the plaintiff "failed to demonstrate that" its patent infringement claims "arose out of or [were] related to the Association's contacts with" SD in Oregon.⁴¹¹ "The Association's presence in Oregon to solicit advertising, promote products, [and] provide training [was] in no way related to" SD's claim that the Association's flight planning products infringed on SD's patents, particularly because the flight planners were only accessed through the Association's website.⁴¹² The defendant's only conduct with Oregon that may have been related to the patent claims was a meeting between Stenberg and an Association representative "to discuss the development of an online flight planner" that occurred "two to three years before the patents were issued," but there was "no evidence to link this meeting with the Association's subsequent offering of the allegedly infringing . . . planning products."⁴¹³ Consequently, the action was dismissed because SD "failed to meet its burden of demonstrating that" either the Association had continuous and systematic general business contacts within Oregon or that its claims arose "out of or were related to the Association's contacts" within Oregon.⁴¹⁴

5. *Clay v. AIG Aerospace Ins. Services, Inc.*

This suit arose out of an airplane crash, caused when "a vacuum pump within the [planes'] engine failed in flight," resulting in the deaths of the pilot and his passenger.⁴¹⁵ The engine and vacuum pump (the components) had several buyers and sellers after manufacture, and before the crash, including the Defendants Ruhe Sales, Inc., Bob Ruhe, and Eric Ruhe (the Ruhe Defendants). The Ohio residents purchased the destroyed aircraft, including the components, from Defendant AIG via an Internet auction, and then traveled to Florida to transport the aircraft to Ohio.⁴¹⁶ Once back in Ohio, the Ruhe Defendants removed the components and sold and shipped them to Defendant Air-Tec, Inc. (Air-Tec) in Florida.⁴¹⁷ Eventually the compo-

⁴¹¹ *Id.*

⁴¹² *Id.* at *8.

⁴¹³ *Id.*

⁴¹⁴ *Id.* at *7-8.

⁴¹⁵ *Clay v. AIG Aerospace Ins. Serv., Inc.*, No. 6:14-cv-235-Orl-40GJK, 2014 WL 6469422, at *1 (M.D. Fla. Nov. 17, 2014).

⁴¹⁶ *Id.* at *2.

⁴¹⁷ *Id.*

nents ended up in the decedents' aircraft. The plaintiffs initiated claims for negligence, strict liability, and breach of warranty based on these events.⁴¹⁸ The Ruhe Defendants moved to dismiss for lack of personal jurisdiction, contending "they [had] not invoked the jurisdiction of Florida's long-arm statute and would have their due process rights violated [if] Florida [were] to exercise personal jurisdiction over them."⁴¹⁹

The court noted that personal jurisdiction is obtained if plaintiffs allege "sufficient facts to subject the [Ruhe Defendants] to [Florida's] long-arm statute" and if due process is satisfied because the defendants had sufficient minimum contacts with Florida and the exercise of jurisdiction comported with fair play and justice.⁴²⁰ According to Florida's long-arm statute, a non-resident is subject to "specific jurisdiction by performing any of the acts enumerated by the . . . statute," and is subject to "general jurisdiction by 'engag[ing] in substantial and not isolated activity within [the] state, whether such activity is wholly interstate, intrastate, or otherwise . . . whether or not the [litigation] arises from that activity.'"⁴²¹

"Plaintiffs allege[d] that the Ruhe Defendants . . . submitted themselves to . . . specific jurisdiction" by "(1) operating, engaging in, or carrying on a business venture in Florida, (2) committing a tortious act in Florida, (3) causing injury to persons or property by conducting certain solicitation or service activities within Florida, and (4) breaching a contract by failing to perform acts required to be performed in Florida."⁴²² "Regardless of which enumerated act through which a plaintiff asserts specific jurisdiction," the court reasoned, "the complaint must allege a cause of action 'arising from' that enumerated act in Florida," and "the phrase 'arising from' requires that the place of injury be [in] Florida."⁴²³ The court found that the plaintiffs' injuries "did not accrue in Florida."⁴²⁴ Further, the plaintiffs "did not incur injuries until the fatal plane crash," which occurred later, after the Ruhe Defendants bought and sold the

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at *8.

⁴²⁰ *Id.*

⁴²¹ *Id.* at *9 (citing Fla. Stat. § 48.193(2) (2014)).

⁴²² *Id.*

⁴²³ *Id.* (citing Fla Stat. § 48.193(1)(a); *Hollingsworth v. Iwerks Entm't, Inc.*, 947 F. Supp. 473, 478 (M.D. Fla. 1996)).

⁴²⁴ *Id.*

components.⁴²⁵ “Because [the] crash occurred in Texas[,] not Florida,” the court declined to exercise specific jurisdiction over the Ruhe Defendants.⁴²⁶

The plaintiffs also alleged the Ruhe Defendants were subject to general jurisdiction “by engaging in ‘substantial and not isolated activity’ within [Florida],” construed as “‘continuous and systematic business contact’ [within] the state.”⁴²⁷ The court noted that a non-resident submitted to “general jurisdiction where he ‘purposely avails [himself] of the privilege of conducting activities within [Florida], thus invoking the benefits and protections of its law,’ ”⁴²⁸ but such “purposeful availment” did not attach where a defendant’s contacts were “‘random,’ ‘fortuitous,’ or ‘attenuated.’ ”⁴²⁹ The court found “[t]he Ruhe Defendants’ activity within Florida [was] limited.”⁴³⁰ The Ruhe corporate defendant was an Ohio corporation headquartered in Ohio, Eric Ruhe was a California resident, and they had never been domiciled, “conducted or solicited business, owned property, maintained bank accounts, received mail, or engaged in any other meaningful business contact [with] Florida.”⁴³¹ The Ruhe Defendants’ “only contacts with Florida involved the original purchase of the” components from AIG in Florida, “and the subsequent sale of same to Air-Tec,” a Florida defendant.⁴³² When the Ruhe Defendants purchased the components, “Eric Ruhe entered Florida for the sole purpose of” transporting the components back to Ohio, and when the Ruhe Defendants sold the components, “Eric Ruhe responded to an Internet advertisement seeking similar airplane engines and negotiated a sale of the” components over the telephone.⁴³³ “Air-Tec then hired a trucking company to travel to Ohio, pick up the” components, and bring the items to Air-Tec in Florida.⁴³⁴ Because these were the extent of the Ruhe Defendants’ contacts with Florida, “the [c]ourt [could not] find that the Ruhe Defendants engaged in

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.* at *10 (quoting *Autonation, Inc. v. Whitlock*, 276 F. Supp. 2d 1258, 1262 (S.D. Fla. 2003)).

⁴²⁸ *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985)).

⁴²⁹ *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980)).

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

‘continuous and systematic business contact’ with Florida.”⁴³⁵ The trip to Florida was a “random, isolated event,” since the Rhue Defendants’ “next contact with Florida did not occur for another six years,” when they sold the components.⁴³⁶ Similarly, the sale of the components to a Florida party was insufficient to confer jurisdiction “because the Ruhe Defendants did not intentionally seek out a Florida resident to whom they would make the sale;” rather, “they merely responded to an Internet advertisement that happened to be published by a Florida resident.”⁴³⁷ Lastly, the “Ruhe Defendants did not cause [the components] to enter Florida; they simply allowed a Florida resident [to] pick up” the purchased items.⁴³⁸ “Consequently, the Ruhe Defendants [had] not submitted [to] general jurisdiction.”⁴³⁹ The court granted the motion to dismiss because the Ruhe Defendants were not “reached by Florida’s long-arm statute under either specific or general jurisdiction.”⁴⁴⁰

L. UNMANNED AIRCRAFT SYSTEMS

1. Huerta v. Pirker

In a year filled with prominent aviation news, among the most intriguing story lines has been (and still remains) the emergence of unmanned aircraft systems (UAS, or in the vernacular, drones). The technology has been available and in use for many decades, but recent advances in both micro-computing and propulsion, among other areas, have seen UAS enter the public consciousness and public skies as never before. In 2014, daily headlines announced the ambitions (and frustrations) of a wide-range of constituencies, from newsgathering organizations, to real estate brokers, and of course hobbyists, ready to deploy the latest generation of UAS technology for fun and profit. Holding back progress, however—and the author shares this observation with the greatest respect for the FAA—is a federal regulatory framework that is simply not ready for the mass deployment of small, swift, inexpensive commercial aircraft under the control of unlicensed pilots.

⁴³⁵ *Id.* at *11.

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

For the time being, until the FAA promulgates new regulations, operators must comply with a body of regulations developed long ago and with little, if any, contemplation of the current state of the art of UAS.

Enter Raphael Pirker, a Swiss citizen who in 2013 was the subject of an FAA Order of Assessment, imposing a civil penalty in the amount of \$10,000 for his operation of a Ritewing Zephyr powered glider aircraft in the vicinity of the University of Virginia in 2011.⁴⁴¹ Pirker had equipped the device for use with photographic and video equipment, for which he was to be compensated.⁴⁴²

Pirker appealed the Assessment, which served as the government's complaint, and moved to dismiss.⁴⁴³ The FAA alleged that Pirker carelessly or recklessly operated the UAS in violation of 14 C.F.R. Part 91, § 91.13(a), which provides that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."⁴⁴⁴ Pirker argued that his drone was a hobby aircraft and not an "aircraft" within the meaning of 14 C.F.R. Part 1, § 1.1.⁴⁴⁵ Pirker further argued that there is no "valid rule for application of FAR regulatory authority over model aircraft flight operations."⁴⁴⁶ The FAA supported its position with reference to the word "device," which appears in both the Code of Federal Regulations and the U.S. Code in the context of "aircraft," thus incorporating among other things model aircraft.⁴⁴⁷

The ALJ was persuaded that Pirker's drone qualified as a "model aircraft," and that the FAA lacked regulatory and enforcement authority over such a device.⁴⁴⁸ The ALJ found that the FAA's contention that a model aircraft is an "aircraft,"

is diminished on observation that FAA historically has not required model aircraft operators to comply with requirements of FAR Part 21, Section 21.171 et seq and FAR Part 47, Section 47.3,

⁴⁴¹ Huerta v. Pirker, No. CP-217, 2014 WL 3388631, at *1 (N.T.S.B. Mar. 6, 2014).

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at *1, n.3 (quoting 14 C.F.R. 91.13(a) (2014)).

⁴⁴⁵ *Id.* at *1. "14 C.F.R. Part 1, [§] 1.1 states as the FAR definition of the term 'Aircraft' a 'device that is used or intended to be used for flight in the air.'; *id.* (quoting 14 C.F.R. § 1.1 (2014)). "Part 91, § 91.1 states that Part, 'prescribes rules governing operation of aircraft.'" *Id.* (quoting 14 C.F.R. § 91.1(a)).

⁴⁴⁶ *Id.* at *1.

⁴⁴⁷ *Id.* at *1-2.

⁴⁴⁸ *Id.* at *3.

which require Airworthiness and Registration Certification for an aircraft. The reasonable inference is not that FAA has overlooked the requirements, but, rather that FAA has distinguished model aircraft as a class excluded from the regulatory and statutory definitions.⁴⁴⁹

Further, the ALJ found no direct authority in the body of FAA regulations or policy concerning UAS operations.⁴⁵⁰ And taking into consideration the FAA Modernization and Reform Act of 2012, the ALJ observed that this Act tasked the FAA “to develop a plan for integration of civil UAS” and to publish “a final rule on small UAS.”⁴⁵¹ Had the legislators been reacting to an existing body of rules or regulations regulating small UAS, including model aircraft, reasoned the ALJ, “the 2012 Act would have called for action to repeal, amend, or modify the existing rules or regulations, and not require a date for issuance of a final rule.”⁴⁵²

Pirker’s motion to dismiss was granted, and the Order of Assessment was vacated,⁴⁵³ thereby, at least in theory, freeing the skies for virtually all manner of unregulated small UAS activity. The FAA appealed, though, and while the UAS community in 2014 awaited a new decision, the FAA continued to process applications for licenses to engage in commercial UAS operations.⁴⁵⁴

In an order issued November 18, 2014, the NTSB reversed the ALJ’s decision in its entirety.⁴⁵⁵ The NTSB focused on two questions:⁴⁵⁶ First, whether Pirker’s UAS qualifies as an “aircraft” within the ambit of the FAA’s enabling statute.⁴⁵⁷ Second, whether the Pirker device is subject to 14 C.F.R. § 91.13.⁴⁵⁸ The NTSB found in favor of the FAA on both issues.⁴⁵⁹

⁴⁴⁹ *Id.* at *2.

⁴⁵⁰ *Id.* at *3.

⁴⁵¹ *Id.* at *4 (quoting FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 332(a), 126 Stat. 72 (2014)).

⁴⁵² *Id.* at *4.

⁴⁵³ *Id.* at *5.

⁴⁵⁴ *Huerta v. Pirker*, No. CP-217, 2014 WL 6440411, at *1 (N.T.S.B. Nov. 18, 2014).

⁴⁵⁵ *Id.*

⁴⁵⁶ Opinion and Order at 4, *Huerta v. Pirker*, No. EA-5730 (N.T.S.B. Nov. 18, 2014), available at www.nts.gov/legal/alj/OnODocuments/Aviation/5730.pdf.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

The NTSB first found that the definition of “aircraft” includes “‘any’ ‘device’ that is ‘used for flight.’”⁴⁶⁰ With regard to the FAA’s prior treatment of model airplanes and other small aircraft, the NTSB explained that the agency’s forbearance from regulating these devices does not limit its statutory authority to do so.⁴⁶¹ The NTSB also validated the Administrator’s application of 14 C.F.R. § 91.13(a) to UAS as a reasonable interpretation of the regulation.⁴⁶² The matter was remanded to the ALJ for further proceedings consistent with the decision of the NTSB.⁴⁶³ On January 22, 2015, an Amended Order of Assessment announced a settlement agreement whereby Pirker agreed to pay a civil penalty in the amount of \$1,100.⁴⁶⁴ He did not admit to any allegation of wrongdoing.⁴⁶⁵

While *Pirker* has been something of a structural beam supporting the FAA’s efforts to maintain law and order out on the wild UAS frontier, its role as such is likely to be short-lived, as the FAA’s much anticipated UAS Notice of Proposed Rulemaking (NPRM) is expected in the near future. Meanwhile, a number of commercial UAS enthusiasts have filed petitions for exemption with the FAA to determine whether a given UAS operation can be conducted safely under the current regulations.⁴⁶⁶ At present time, the FAA continues to issue exemptions in sufficient number, and for a wide enough range of applications, that one can fairly perceive a laboratory of on-going UAS experiments available for the FAA to analyze while it contemplates its forthcoming NPRM.

M. EXPERT TESTIMONY

1. Harman v. Honeywell International, Inc.

*Harman v. Honeywell International, Inc.*⁴⁶⁷ arose out of a single-engine airplane accident involving a father and son that occurred just outside of Chesterfield, Virginia.⁴⁶⁸ The estates filed

⁴⁶⁰ *Id.* at *6.

⁴⁶¹ *Id.* at *7.

⁴⁶² *Id.* at *8.

⁴⁶³ *Id.* at *4.

⁴⁶⁴ *Pirker*, Docket No. 2012EA210019 (FAA Jan. 22, 2015).

⁴⁶⁵ *Id.*

⁴⁶⁶ E. Tazewell Ellett & Patrick R. Rizzi, *Three More FAA Exemptions for Commercial Use of Unmanned Aircraft Systems*, LEXOLOGY (Feb. 3, 2015), www.lexology.com/library/detail.aspx?y=27f51c4e-d8c2-48fc-be6768cc13f9.

⁴⁶⁷ 758 S.E.2d 515 (Va. 2014).

⁴⁶⁸ *Id.* at 518.

suit against Honeywell International, Inc. alleging at trial a claim for breach of warranty (other claims were previously dismissed).⁴⁶⁹ The estates claimed “that the defective design of the Honeywell autopilot system allowed microscopic debris to enter . . . the gear systems . . . causing the plane to become uncontrollable.”⁴⁷⁰ Honeywell argued that the pilot was inexperienced which caused him to experience “spatial disorientation” under heavy cloud cover.⁴⁷¹

At trial, Honeywell introduced into evidence a crash investigation report prepared after the accident by Mooney Airplane Company.⁴⁷² Mooney manufactured the accident aircraft.⁴⁷³ In addition, Honeywell introduced testimony from two lay witnesses, William Abel and Thomas Norman, who were the decedent-father’s flight instructor and co-owner of the Mooney plane, respectively.⁴⁷⁴ Honeywell used their collective testimony to prove that the father-decedent lacked sufficient experience and proper judgment to fly the aircraft, particularly in less than optimal weather conditions.⁴⁷⁵ Notably, Mr. Abel testified that the decision to fly in the weather conditions that existed made the pilot’s judgment questionable.⁴⁷⁶ Mr. Norman testified “that the Mooney plane was faster, more powerful, more complex, and more difficult to maneuver than” a typical Cessna plane.⁴⁷⁷

The jury returned a verdict for Honeywell.⁴⁷⁸ The estates appealed, contesting the admissibility of the supposed improper opinion testimony of Abel and Norman and the admissibility of the Mooney report, and moved for a new trial.⁴⁷⁹ The circuit court denied that motion.⁴⁸⁰ Plaintiffs appealed to the Virginia Supreme Court.⁴⁸¹

First, the court addressed the Mooney crash investigation report which was admitted under the “published treatise” category

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at 519.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 522–23.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 522.

⁴⁷⁷ *Id.* at 523.

⁴⁷⁸ *Id.* at 519.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

under the hearsay exception.⁴⁸² The report focused on the position of a “jackscrew,” a component in the autopilot system, which the plaintiffs alleged caused the plane to take off in a nose down take-off trim setting.⁴⁸³ The court held that the Mooney report was erroneously admitted into evidence because it was not the type of authoritative literature allowed by Virginia law.⁴⁸⁴ First, the report lacked trustworthiness and was not “established as reliable authority” by Honeywell’s expert because he could not say that similar investigation reports are common for experts to rely on in the field.⁴⁸⁵ The court noted that learned treatises usually “have sufficient indicia of trustworthiness because their authors have no bias . . . and are aware that their work will be read and evaluated by others.”⁴⁸⁶ This report, which was prepared for litigation, “was not subjected to peer review or public scrutiny, and it was not written primarily for professionals with the reputation of the writer at stake.”⁴⁸⁷ Of even more significance, Mooney was a defendant in the case at the time the report was prepared.⁴⁸⁸ The Virginia Supreme Court also found that the admission of the report was not harmless error because it contained conclusions which went to the “heart of the case” and otherwise opined on issues not addressed by other evidence.⁴⁸⁹ Based on the report alone, the court found basis to reverse the circuit court’s ruling and remand for a new trial.⁴⁹⁰

The court also addressed the lay witness testimony offered by Mr. Abel and Mr. Norman.⁴⁹¹ Citing Virginia authority, the Court explained that lay witness testimony is admissible if “it is reasonably based upon the personal experience or observations of the witness and will aid the trier of fact in understanding the witness’s perceptions.”⁴⁹² The court held that Mr. Abel’s opinion about the pilot’s judgment was inadmissible and an impermissi-

⁴⁸² *Id.* at 520.

⁴⁸³ *Id.* at 520–23.

⁴⁸⁴ *Id.* at 521–22.

⁴⁸⁵ *Id.* at 521 (quoting Va. Code Ann. § 8.01-401.1 (West 2014)).

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* (quoting *United States v. Martinez*, 588 F.3d 301, 312 (6th Cir. 2009)).

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 521–22.

⁴⁹⁰ *Id.* at 522.

⁴⁹¹ *Id.* at 522–23.

⁴⁹² *Id.* at 523 (quoting Va. Sup. Ct. R. 2:701).

ble assessment of the pilot's potential comparative negligence.⁴⁹³

However, the court deemed Mr. Norman's testimony admissible because "it did not address [the pilot's] judgment or flying abilities."⁴⁹⁴ Mr. Norman's testimony regarding the difference between the Mooney plane and a Cessna plane used by the pilot during training was necessary to inform the jury about the difference in capabilities between the two aircraft.⁴⁹⁵ This testimony was especially relevant because it illuminated on the pilot's ability to handle the Mooney plane on the day of the accident.⁴⁹⁶

III. CONCLUSION

In the year ahead, one can expect continued development of all of the more frequently litigated issues. Indeed, a comparison of each year's "Recent Developments" article, going back a number of years, supports this prophecy. But there is much that awaits beyond the same-old same-old. As the UAS revolution expands, there would appear to be abundant unexplored territory on the legal frontier, from common law tort and trespass, to regulatory compliance, to privacy. Drones will elevate many of our terrestrial issues to the skies. Cyber technology, including hacking⁴⁹⁷ and abuse of social media,⁴⁹⁸ will continue to emerge as an acute challenge for the entire aviation community, from hobbyists to airlines. And, of course, the tension between security and privacy, at our airports and in our skies, will remain a challenge for our legislators, law enforcement, courts, and for ourselves.

⁴⁹³ *Id.* at 524.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ Gaurav Raghuvanshi et al., *Malaysia Airlines Website Hacked by Group Calling Itself 'Cyber Caliphate'*, WALL ST. J. (Jan. 26, 2015, 7:59 AM), <http://www.wsj.com/articles/malaysia-airlines-website-hacked-by-group-calling-itself-cyber-caliphate-1422238358>.

⁴⁹⁸ Bart Johnson & Larry Copland, *A New Air Hassle Takes Off—Tweet or Terror: It's Much More Than Mischief*, USA TODAY, Jan. 29, 2015, at § A1.

